

Corruption and legal methods of fighting it

**The European Union policy towards the Central
and Eastern European Countries before and after
the accession**

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Declaration

I hereby declare that, except where otherwise indicated, this thesis is entirely my own work, and that no part of it has been submitted for any other degree or professional qualification.

Abstract

The fight against corruption emerged as one of the most significant issues during the 2004 enlargement and gained even more importance with the accession of Romania and Bulgaria in 2007. This thesis examines the European Union (EU) policy against corruption in the context of the accession of the Central and Eastern European countries in 2004. Its prime objective is to illustrate the differences between EU policy towards existing Member States and the candidate countries in this area. The thesis outlines the legal bases and historical development of the EU anti-corruption framework, and goes on to show that the enlargement process has profoundly transformed this policy framework. It analyses how the fight against corruption became one of the EU membership criteria and explains that accession policy forced the EU to create new institutions and mechanisms to address the problem of corruption within the candidate countries. The thesis also argues that the experience gained by the EU in the 2004 enlargement led to a more robust anti-corruption stance during the accession of Bulgaria and Romania and will have implications for any future enlargements of the EU. However, the thesis further points at the limited nature of the anti-corruption framework that applies to existing Member States and argues that it does not respond to the urgent need to enhance anti-corruption standards within the EU. The thesis suggests that the EU should use the experience gained within the pre-accession process to develop a more coherent framework that would promote higher anti-corruption standards among Member States.

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Acronyms and Abbreviations

CEE countries- Central and Eastern European countries

CEWP- Collective Evaluation Working Party

CPI- Corruption Perception Index

EACN- European Anti-Corruption Network

EC- European Community

ENP- European Neighbourhood Policy

EP- European Parliament

EU- European Union

FATF- Financial Action Task Force

GRECO- Group of States Against Corruption

JHA- Justice and Home Affairs

NGO- Non-Governmental Organisation

OECD- Organisation for Economic Co-operation and Development

OECD WG- OECD Working Group on Bribery

OLAF- European Anti-Fraud Office

OMC- Open Method of Coordination

OSI- Open Society Institute

PHARE- Community assistance programme for the Central European candidate countries

UN- United Nations

UNCAC- United Nations Convention Against Corruption

UNCATOC- United Nation Convention Against Transnational Organised Crime

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Introduction

Since the end of communism in Central and Eastern Europe, corruption has emerged as a major political issue and a serious impediment to efforts for social and economic development in the region. As a result of the biggest enlargement process in the European Union (EU) history, eight post-communist countries (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) joined the EU in 2004.

The pre-accession process coincided with the collapse of communism and the EU was in a unique position to guide the Central and Eastern European (CEE) countries in their democratic and economic transitions. Combating corruption gained unprecedented importance during this process. It was recognised as a central element of democratic governance and the rule of law and became an explicit condition for EU membership. Throughout the pre-accession period, the EU attempted to tackle the issue of corruption in the CEE countries. The EU influenced the national anti-corruption policies and demanded reforms from the candidate countries in a way that had never occurred within the EU Member States.

This thesis does not offer a systematic treatment of the causes of the phenomenon of corruption or its principal characteristics. Therefore, there is also no significant analysis of the capacity of legal regulation to penetrate this phenomenon and bring about effective change. Instead, the thesis focuses on the EU anti-corruption policy

in the specific context of the 2004 enlargement. In particular, it answers three important questions: what is the policy of the EU against corruption within the CEE countries after accession? Is this policy enough to address the problem of corruption across the Member States? And, if not, should the EU develop a more comprehensive framework?

The thesis builds upon six crucial findings:

- The EU does not have a clear competence under either the EC or the EU Treaty to prevent and combat corruption within the Member States.
- The extent of corruption within the CEE candidate countries forced the EU to develop a new anti-corruption policy for the purpose of the enlargement process.
- Accession represented a challenge but also a great opportunity to influence reforms in the post-communist countries. The enormous leverage within the accession process allowed the EU to influence the anti-corruption policies of the candidate countries to an unprecedented degree.
- The candidate countries had to comply with broad anti-corruption standards and their national policies were under rigorous scrutiny by the EU. The focus was on formal compliance with the EU and international instruments against corruption, rather than implementation of fundamental anti-corruption reforms. The EU did not fully take advantage of the potential offered by the accession process and its efforts were hamstrung by the lack of a framework against corruption within the Member States.
- As a result of the 2004 enlargement, the EU acquired experience in setting the anti-corruption standards and evaluating progress in meeting them across the countries. The EU used this experience in its policy towards Romania and Bulgaria to develop a more robust system of post-accession monitoring.

- Corruption in the new Member States is an ongoing challenge and should continue to be a priority. The lack of coherent anti-corruption framework within the EU and the disappointing results of the accession process may discredit plans for further enlargement of the EU.

I will argue that the EU should develop a more coherent anti-corruption policy for three main reasons. First, the existing anti-corruption framework does not respond to the urgent need to enhance the anti-corruption standards across the Member States and to provide adequate monitoring of those standards. Second, the EU policy does not safeguard the achievements of the pre-accession process, and as a result, the anti-corruption standards are diminished once a country joins the EU. Third, it is appropriate for the EU to act strongly against corruption, as it has the necessary tools and the political capacity to develop an adequate strategy to tackle this problem.

The argument is presented in the legal and political context as of 30 November 2007, except where otherwise indicated. It is set out in seven chapters. Chapter One discusses why corruption emerged as an international policy issue in the 1990s and surveys the major international initiatives in this area. The chapter also introduces the EU's definition of corruption and points at strengths and weaknesses of this definition. Finally, the chapter analyses the causes of corruption in the CEE countries and explains the importance of the fight against corruption for the success of democratic transitions of these countries.

Chapter Two introduces a legal and historical context for the development of the EU policy. The chapter analyses the EU legal powers in the area of anti-corruption under the EC and EU Treaties. The chapter argues that while the EU powers under the EC Treaty are limited by legal factors, the action against corruption under the EU Treaty is constrained by the lack of the political will of the Member States to give up this national field of competence. Next, the chapter moves on to explain that the EU approached corruption in its own unique way through policies aiming at ensuring the proper

functioning of the internal market and protection of the European Communities' (EC) financial interests.

Chapter Three presents an overview of the EU anti-corruption framework. The chapter underlines the limited nature of the EU anti-corruption framework in comparison to the relevant international initiatives. Furthermore, the chapter argues that the EU system for monitoring the implementation of the anti-corruption instruments is fragmented and ineffective.

Chapter Four explains how the fight against corruption became one of the central conditions for EU membership. The chapter argues that the EU was in a unique position to affect the domestic policy making in the CEE countries. The chapter also examines when in the pre-accession process the EU potential to influence the content of anti-corruption reforms was the greatest.

Chapter Five analyses how the EU evaluated the extent of corruption within the CEE candidate countries. The chapter discusses the new mechanisms and institutions in this area developed by the EU for the purposes of the pre-accession policy. Finally, the chapter points at weaknesses and the limited nature of the EU evaluation.

Chapter Six focuses on the EU strategy against corruption within the candidate countries. The chapter begins with discussion of anti-corruption standards set by the EU, making a clear distinction between requirements of the *acquis* and informal standards developed by the EU specifically for the CEE countries. Finally, using the example of Poland, the chapter assesses the impact of the EU accession on the anti-corruption policies of the candidate countries and points at its limits.

Chapter Seven evaluates the impact of the 2004 enlargement on the EU policy against corruption. The chapter shows the reinforcement of the EU anti-corruption strategy towards Romania and Bulgaria and argues that verification mechanisms

developed by the EU are ineffective. Furthermore, the chapter examines the possible developments of the EU policy against corruption.

Finally, the conclusion will present the specific policy recommendations. The case will be made that the EU should develop its own soft law anti-corruption framework in the form of mutually agreed non-legally binding policy recommendations.

Corruption: concept, importance and international response

Corruption is not a new phenomenon. However, it was only in the 1990s that it first emerged as a global policy problem that could no longer be addressed purely through domestic means. In the era of globalisation, a truly international response involving major international policy players is vital to the success of anti-corruption initiatives.

The goal of this chapter is to introduce the central concept of corruption and give an overview of the major international instruments in this area. To this end, the chapter starts with a discussion of the definition of corruption adopted by the EU.¹ It points out the strengths and weaknesses of this definition and contrasts it with definitions adopted by other international organisations. Following this discussion, the chapter moves on to analyse the prevalence, causes and consequences of corruption in the CEE candidate countries.

¹ The term EU is normally used throughout the thesis, even when it is in some cases only the first pillar of the EU. The term Community is referred to when it is necessary for clarity of competences under the first pillar.

EU policy within the accession process was based on the perception that corruption in the CEE candidate countries was more widespread than in the Member States. This chapter examines this claim by presenting evidence of corruption within the CEE countries before the accession. In addition, the chapter discusses why the heritage of communism and the nature of political and economic transitions made the CEE countries particularly vulnerable to corruption.

Beyond this, the chapter goes on to look at the emergence of international cooperation against corruption in the 1990s and explains why corruption became an international policy problem. Furthermore, the chapter also surveys the major multilateral initiatives against corruption, shows the evolution of international cooperation and discusses how international organisations can help in preventing and combating corruption across countries. Finally, the chapter examines the monitoring mechanisms relevant to the fight against corruption and emphasises the importance of an effective evaluation system for a success of the anti-corruption initiatives.

1. The EU's definition of corruption

When researching corruption, it is apparent from the outset that there is no single and agreed definition as to what constitutes corruption. The concept of corruption is subject to an ongoing debate among political scientists, lawyers, economists and social scientists, who all focus on different aspects of corruption. As has been pointed out, 'no precise definition of corruption can be found which applies to all forms, types and degrees of corruption, or which would be accepted universally as covering all acts, which are considered in every jurisdiction as constituting corruption.'²

² Council of Europe, 'Programme of Action Against Corruption, Multidisciplinary Group on Corruption' (1996), GMC (96) 95, at 14.

While the classical definitions of corruption referred to destruction of public morality and ‘a decline ...of the virtues ...of a state or a ruler’³, modern definitions focus on the actions of individuals and their ‘...discretionary freedom or power in the decision making process.’⁴ According to one of the most cited definitions in the literature introduced by Klitgaard, corruption is likely to occur in conditions where an official has monopoly power and a degree of discretion over certain goods or services, and where the system of accountability is weak.⁵

The European Parliament (EP) provided its first definition of corruption in 1995 as ‘...the behaviour of persons with public or private responsibilities who fail to fulfil their duties because a financial or other advantage has been granted or directly or indirectly offered to them in return for actions or omissions in the course of their duties.’⁶ In its first Communication on EU policy against corruption in 1997, the Commission clarified this concept by stating that corruption refers to ‘...any abuse of power or impropriety in the decision making process brought about by some undue inducement or benefit.’⁷ In 1998 this definition was endorsed by the European Court of Auditors.⁸

The Commission subsequently refined the concept of corruption at the EU level in 2003 as an ‘abuse of power for private gain’⁹ explicitly stating that this definition embraces both the public and private sectors. It is important to emphasise that, as far as the definition of corruption is concerned, the EU was in the avant-garde. In contrast to

³ U. von Alemann, ‘The unknown depths of political theory: The case for a multidimensional concept of corruption’ (2004) *Crime, Law & Social Change* 42, 25-34, at 26.

⁴ P. C. van Duyne, ‘Will “Caligula” go transparent?’ (2001) *Forum on Crime and Society*, Vol. 1 No. 2, 73-98, at 74.

⁵ R. Klitgaard, *Controlling Corruption* (University of California Press, Berkeley, 1988), at 75.

⁶ European Parliament, ‘Resolution on combating corruption in Europe’ (1995), A4-0314/1995, OJ C 017/443, 22.01.1996.

⁷ Commission (EC), ‘Communication from the Commission to the Council and the European Parliament on a Union policy against corruption’, COM(97) 192 final, 21.05.1997, at. 1.

⁸ Court of Auditors, ‘Special Report No 8/98’, OJ C 230, 22.7.1998, para 6.1.

⁹ Commission (EC), ‘Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a comprehensive EU policy against corruption’, COM(2003) 317 final, 28.5.2003, at 6.

definitions employed by other international agencies, which placed the public sector at the centre, the EU's definition of corruption, since its first formulation in 1995, included both public and private sectors. The Commission emphasised that it did not wish to adopt traditional definitions followed by the World Bank and the leading non-governmental organisation in this area, Transparency International, which viewed corruption as 'the use of one's *public* position for illegitimate private gains.'¹⁰ Over time, Transparency International also adopted a broader definition of corruption as 'the misuse of entrusted power for private gain'¹¹ to include the private sector. The World Bank's definition, however, remains deliberately confined to the public sector, as the World Bank lends primarily to governments and supports government policies, programs, and projects.¹²

At the outset only public sector corruption (corruption carried out by and against public officials) was subject to studies and legal regulation at national and international levels. Regulation of private sector corruption (corruption within business activities) is more recent. This late response can be attributed to the perception that the owners of companies would take the necessary measures to prevent employees from acting in ways that are likely to harm the organization and that there are fewer incentives for corruption in the private sector, as in economies with effective competition inefficient behaviour is penalised by the market.¹³ Over time, however, an agreement emerged that private sector corruption constituted a serious problem and had to be met with an international response. There were three main reasons for this. First, the private sector corruption also had international ramifications. Second, it has been pointed out that 'the private sector is larger than the public sector in many countries, and the line between the two sectors is

¹⁰ Ibid.

¹¹ Transparency International, 'Frequently asked questions about corruption', see:

<http://www.transparency.org/news_room/faq/corruption_faq#faqcorr1> accessed 9 December 2007.

¹² World Bank, 'Helping Countries combat corruption: The role of the World Bank' (1997), at 9

<<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>> accessed 9 December 2007.

¹³ A. Argandoña, 'Private-to-private Corruption' (2003) *Journal of Business Ethics* 47, 253-267, at 253.

blurred by privatisation, outsourcing and other developments.¹⁴ Third, as Webb has noted, the huge economic influence of multinational corporations and the leverage they had in relation to states, meant that they also had to be a target of an international anti-corruption strategy.¹⁵

When defining corruption for the purposes of EU policy, the Commission drew a distinction between a narrow criminal law definition and a broader concept of corruption as an 'abuse of power for private gain' used for purposes of prevention policy. A similar distinction is also reflected in the policies of other leading international organisations in the area of anti-corruption, such as the United Nations (UN) and the Council of Europe. For the purposes of prevention, the UN accepts the same definition of corruption as the EU.¹⁶ Meanwhile, the Council of Europe adopts a slightly narrower approach by accepting that the definition of corruption cannot be unduly broad and cover a number of general offences committed by people in the course of their employment, such as fraud, embezzlement, theft and other acts which prejudice the employer and explains that '...corruption is not about putting one's fingers in the till but more about the abuse of power or improbability in the decision-making process.'¹⁷

The EU restricts its criminal law definition to 'passive' and 'active' bribery. In short, 'passive' bribery refers to taking bribes and 'active' bribery refers to giving bribes by a person who induces corruption. As will be discussed in more detail in Chapter Three, the definition of bribery adopted in EU instruments does not differ in any substantial way from bribery as defined in other international instruments. However, it is important to emphasise that bribery is only one of the types of corruption, and there are

¹⁴ Transparency International Press Release, 'UN Convention must criminalise private sector corruption' (2003) http://www.transparency.org/news_room/latest_news/press_releases/2003/2003_03_11_un_convention accessed 9 December 2007.

¹⁵ P. Webb, 'The United Nations Convention Against Corruption. Global Achievement or Missed Opportunity?' (2005) *Journal of International Economic Law*, Vol. 8 No. 1, 191-229, at 213.

¹⁶ United Nations Office for Drug Control and Crime Prevention, 'Global Dynamics of Corruption, The role of the United Nations Helping Member States Build Integrity to Curb Corruption' (2002), at 3 <http://www.unodc.org/pdf/crime/gpacpublications/cicp3.pdf> accessed 9 December 2007.

¹⁷ Council of Europe (n 2), at 15.

many other common forms, such as favouritism, nepotism, embezzlement, trading in influence, buying votes or illegal political party financing.¹⁸

In contrast to the EU, the UN and the Council of Europe adopt broader approaches and criminalise other types of corruption as well. The UN Convention Against Corruption (UNCAC) adopted in 2003 focuses on the criminalisation of specific types of corrupt conduct, such as bribery, embezzlement, trading in influence and abuse of functions.¹⁹ The Council of Europe Criminal Law Convention on corruption prescribes criminalisation of bribery offences and trading in influence.²⁰ It is also worthy of note that the Council of Europe introduced the definition of corruption, for the purposes of civil law, as 'requesting, offering, giving or accepting directly or indirectly a bribe or any other undue advantage or the prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.'²¹

The distinction between the criminal-law definition and the broader concept of corruption adopted for the purposes of prevention is very important. Criminal law definitions constitute a basis for prosecuting offenders and therefore must be clear-cut and precise. Clarity of definition is a safeguard against the discretionary power of public authorities. As a result, the criminal law usually does not define corruption in a broader

¹⁸ For discussion see: United Nations Office on Drugs and Crime, 'The Global Programme Against Corruption. UN Anti-Corruption Toolkit' (3rd edn, Vienna 2004)

<http://www.unodc.org/pdf/corruption/publications_toolkit_sep04.pdf> accessed 9 December 2007.

¹⁹ Articles 15-19 of the United Nations Convention against Corruption, Resolution 58/4 (adopted 31 October 2003, entered into force 14 December 2005) (the UNCAC)

<http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf> accessed 9 December 2007.

²⁰ Articles 2-12 Council of Europe, Criminal Law Convention on Corruption, ETS No.: 173 (adopted 27 January 1999, entered into force 1 July 2002) (the Criminal Law Convention)

<<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=173&CM=1&DF=7/11/2007&CL=ENG>> accessed 9 December 2007.

²¹ Council of Europe, 'Civil Law Convention on Corruption: Explanatory Report' ETS No.: 174

<<http://conventions.coe.int/Treaty/EN/Reports/Html/174.htm>> accessed 9 December 2007.

sense, but is restricted only to certain types of corrupt conduct, which can be more precisely defined, such as taking or giving bribes.²²

The concept of corruption for the purposes of prevention must be more inclusive. As the Council of Europe has been noted:

...no comprehensive and all-embracing strategy in the fight against corruption can ever be formulated, if one were to limit such measures to criminal corruption alone. ...a corrupt practice or system might not as yet be considered by law an offence, but such an omission would not render it less corrupt in its character.²³

The concept used for purposes of prevention should embrace the criminal law definition, but it cannot be limited to it. Apart from criminalisation, a comprehensive anti-corruption strategy must focus on enhancing integrity and accountability. Criminal law regulations are not flexible enough to embrace all types of corrupt conduct. The concept of corruption employed for the purposes of prevention should target not only the conduct, which is illegal at a given time, but also activity that is unethical. Adoption of a broader concept also ensures that no corrupt conduct will be excluded from policy in the future.

The EU's definition of corruption as the 'abuse of power for private gain' is broad enough to include most forms of corruption. Its scope, however, is not entirely clear. Questions arise how to define vague concepts like 'abuse of power' or 'private gain'. As Alemann has noted, this '...definition starts from the assumption that a concrete, formal and informal system of laws and norms exists which is accepted by all sides' and that is not the case.²⁴ Often the rules may not be exactly defined as to what is allowed and what is not. For example, it is hard to state in a clear way how big the private gain should be in order to fall under this definition. Some authors have argued

²² United Nations (n 16).

²³ Council of Europe (n 2), at 16.

²⁴ Alemann (n 3), at 29.

that there ought to be a threshold value in order to exclude minor benefits, such as in the extreme example where a civil servant takes a pencil belonging to his employers.²⁵

At the same time, however, there is a strong argument for the adoption of a vague and imprecise definition, especially by international organisations such as the EU. The concept of corruption adopted for the purposes of international policy should be more inclusive than the one adopted at the national level, where the agreement as to what constitutes corruption is easier to reach. For an international organisation, that is trying to assist in formulating national anti-corruption strategies, this policy concept must ‘...take into account as many voices and perspectives as possible.’²⁶ Definitions and perceptions of corruption vary across countries depending on different historical, cultural and social traditions. As Csonka has pointed out, corruption is primarily a moral issue.²⁷ What constitutes corruption in one society may be acceptable as a customary practice in another. Therefore, at the international level the aim should be to adopt a concept that could embrace various definitions of corruption across societies.

2. Case study: Corruption in the Central and Eastern European countries

2.1. The prevalence of corruption in the post-communist countries

As will be discussed in Chapter Four, the fight against corruption became a membership condition for the first time within the accession process of the CEE countries. The EU created new institutions and developed anti-corruption standards to guide and assist these countries with their anti-corruption reforms. This policy developed as a result of the perception that corruption in the CEE candidate countries constituted a more serious problem than in the old Member States.

²⁵ Ibid.

²⁶ United Nations (n 16), at 4.

²⁷ P. Csonka, ‘Corruption: The Council of Europe’s Approach’ in B. A.K.Rider (ed), *Corruption: The Enemy Within* (Kluwer Law International, 1997), 343-353, at 346.

Before presenting evidence on the prevalence of corruption in the CEE countries, it is important to understand that measuring corruption across countries faces at least three formidable challenges. First, the measurement of corruption is hampered by the lack of an agreed definition of corruption across countries. Thus the question arises as to what exactly one should measure. Second, even if definitions can be agreed, there is a risk that limiting measurement to well-defined types of corruption does not reflect the real extent of the phenomenon in a society. For example, as Tanzi has noted, measuring bribes paid only would ignore a whole range of corrupt acts that are not accompanied by the payment of bribes.²⁸ Third, corruption will likely be undercounted because it is a crime that does not have an obvious victim who could report it and the parties involved have a mutual interest in hiding their activity.

Generally, the incidence of corruption can be measured in three basic ways: by number of prosecutions, perception or experience. Each way has its shortcomings. As far as prosecutions are concerned, it has been pointed out that a serious analysis cannot rely on the number of prosecutions only and ‘... would not deduce from a larger number of bribery convictions that corruption is more widespread.’²⁹ Counting the number of prosecutions provides an indication of the effectiveness or intensity of law enforcement efforts, rather than actual levels of corruption.

Another source of evidence is provided by international surveys on the perception of corruption, which at present constitute the prevailing source of information. The most widely recognised index measuring the perception of corruption across a great number of countries is the Transparency International Corruption Perception Index (CPI).³⁰ The weakness of this form of measurement lies in the fact that

²⁸ V. Tanzi, ‘Corruption Around the World: Causes, Consequences, Scope, and Cures’ (1998) IMF Working Paper WP/98/63, at 20.

²⁹ Open Society Institute, ‘Monitoring the EU Accession Process: Corruption and Anti-Corruption Policy’, 2002, at 25 (OSI Report) <<http://www.eumap.org/reports/2002/corruption>> accessed 6 December 2007.

³⁰ On the methodology of the Transparency International CPI 2007, see: <http://www.transparency.org/policy_research/surveys_indices/cpi/2007/methodology> accessed 9 December 2007.

it also does not measure the actual extent of corruption, but merely how people perceive the problem. This is especially problematic if the perception of corruption is inflated not because it really is more prevalent than elsewhere, but instead due to greater media independence in a given country that gives greater exposure to corruption cases and raises public awareness.

Finally, surveys of the actual experience of corruption also do not provide fully reliable data. Their reliability may be impaired by the fact that respondents prefer not to disclose the information, especially if they participated in a corrupt act. For example, the high levels of refusal constituted a problem in the 1999 Business Environment and Enterprise Performance Survey (BEEPS) conducted by the European Bank for Reconstruction and Development and the World Bank.³¹ Nevertheless, surveys of real experience do represent the most advanced way of collecting information on the actual extent of corruption in a given country.

Although corruption exists to varying degrees in all political systems, it is perceived to be endemic in post-communist countries. As will be discussed in Chapter Four, this perception led the EU to recognise the fight against corruption as one of the membership conditions in 1997. Indeed, there is considerable survey evidence available from that time suggesting that corruption in the candidate countries was perceived to be a more serious problem than in the old Member States.

The first analysis of corruption in the CEE countries took place only after the end of communism. The World Bank's study on patterns and trends of corruption in 2000 was one of the first comprehensive analyses of corruption faced by the business community in the CEE countries.³² It identified and measured two key types of

³¹ See: 1999 BEEPS survey 'Key Findings from the Business Environment Survey of Private Sector Firms in the CEE and CIS countries', at 82 <<http://www.ebrd.com/country/sector/econo/surveys/beepsr99.pdf>> accessed 9 December 2007.

³² World Bank, 'Anticorruption in Transition: A Contribution to the Policy Debate' (2000) <<http://www.worldbank.org/wbi/governance/pdf/contribution.pdf>> accessed 9 December 2007.

corruption in the transition countries: state capture, including bribes paid to influence laws and regulations³³ (for example, illegal contributions by private actors to political parties or the sale of court decisions to private interests) and administrative corruption, including, bribes paid for regular administrative dealings³⁴ (for example, bribes to gain licenses or win public procurement contracts). The World Bank concluded that ‘corruption has become pervasive in many transition countries’ and that the roots of this problem ‘...reach deep into historical legacies, economic structures, and transition paths.’³⁵ The findings of the World Bank were later confirmed by the Open Society Institute (OSI) report in 2002, which found that state capture, in the form of uncontrolled lobbying and corruption in the financing of political parties, constituted a serious problem in many candidate countries.³⁶

In addition, the World Bank presented a comparison of twelve of the most widely known international corruption indices. (See Figure 1.1)

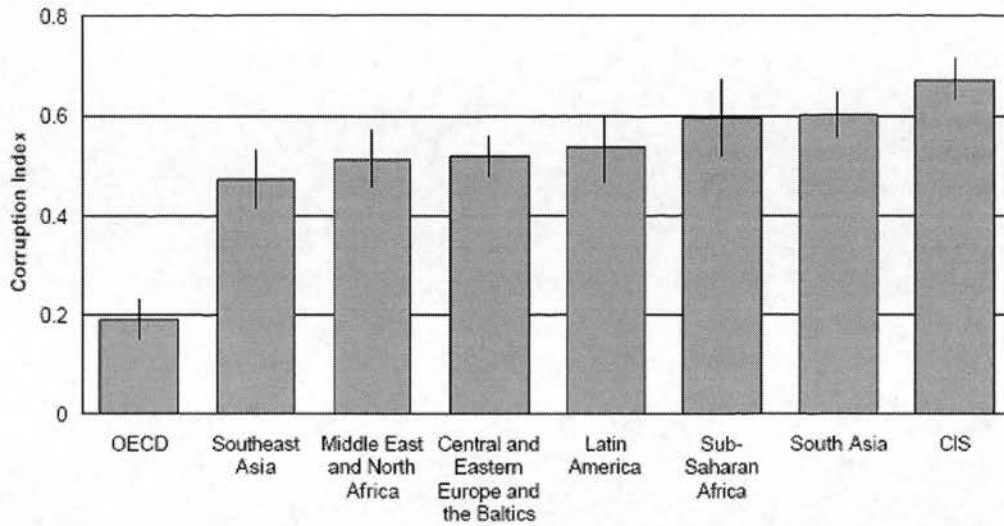
³³ ‘State capture refers to the actions of individuals, groups, or firms both in the public and private sectors to influence the formation of laws, regulations, decrees, and other government policies to their own advantage as a result of the illicit and non-transparent provision of private benefits to public officials.’ (emphasis in original). See: Ibid, at xv-xvi.

³⁴ ‘...administrative corruption refers to the intentional imposition of distortions in the prescribed implementation of existing laws, rules, and regulations to provide advantages to either state or non-state actors as a result of the illicit and non transparent provision of private gains to public officials.’ (emphasis in original). See: Ibid, at xvii.

³⁵ Ibid, at 81.

³⁶ OSI Report (n 29), at 66-67.

Figure 1.1: World-wide Perceptions of Corruption



Source: D. Kaufmann, A. Kraay and P. Zoido-Lobaton, 'Aggregating Governance Indicators' (1999) World Bank: Policy Research Paper No. 2195 quoted in World Bank, 'Anti-Corruption in Transition: A Contribution to A Policy Debate' (2000), at xiv <<http://www.worldbank.org/wbi/governance/pdf/contribution.pdf>> accessed 9 December 2007.

The above data confirmed that corruption in the CEE countries was perceived to be considerably higher than in the OECD countries, which comprised all of the old EU Member States.³⁷

Higher levels of corruption in the CEE countries were also indicated by the Transparency International CPI, which drew upon numerous distinct surveys of expert and general public views of the extent of corruption in countries around the world. The Transparency International CPI score measures perceptions of the degree of corruption as seen by business people and country analysts. For the purposes of the CPI, corruption is understood as 'misuse of *public* power for private benefit.'³⁸ (emphasis added) They range between 10 (highly clean) and 0 (highly corrupt). For the first time, the CPI included all the eight CEE candidate countries in 1999. (See Table 1.1)

³⁷ The accuracy of this comparison is, however, impaired by the fact that the Czech Republic, Hungary, Poland and Slovak Republic are also members of the OECD.

³⁸ Transparency International (n 30).

Table 1.1: Member States and the CEE countries in the 1999 Transparency International CPI

Country	1999 CPI Score	Country Rank
Denmark	10.0	1
Finland	9.8	2
Sweden	9.4	3
Netherlands	9.0	8
Luxembourg	8.8	11
United Kingdom	8.6	13
Germany	8.0	14
Ireland	7.7	15
Austria	7.6	17
Portugal	6.7	21
France	6.6	22
Spain	6.6	22
Slovenia	6.0	25
Estonia	5.7	27
Belgium	5.3	29
Hungary	5.2	31
Greece	4.9	36
Italy	4.7	38
Czech Republic	4.6	39
Poland	4.2	44
Lithuania	3.8	50
Slovak Republic	3.7	53
Latvia	3.4	58

Source: The 1999 Transparency International Corruption Perceptions Index (CPI), 99 Countries were included into the survey

<http://www.transparency.org/policy_research/surveys_indices/cpi/previous_cpi_1/1999> accessed 9 December 2007.

The above survey clearly shows that the problems of corruption appeared to be more acute in the candidate countries (in bold) than in the old Member States. This trend was maintained in the yearly Transparency International CPI throughout the whole pre-accession process.³⁹ It was also evident that the best candidate countries were less corrupt than the worst EU Member States. In Belgium, corruption was perceived to be a bigger problem than in Estonia and Slovenia, while Italy and Greece were ranked lower than Hungary, Estonia and Slovenia. This survey highlights significant problem of

³⁹ Transparency International CPI's <http://www.transparency.org/policy_research/surveys_indices/cpi> accessed 9 December 2007.

double standards within the accession process, which will be discussed in Chapters Four and Six. While the anti-corruption efforts of the candidate countries were under the close scrutiny of the EU, there was no similar policy towards old Member States, even though some of them scored poorly in the international rankings.

The above international findings were later confirmed by public opinion polls in the CEE countries. In a survey in 2003/2004, 92% in Poland, 64% in the Czech Republic, 83% in Slovakia, 72% in Hungary, 88% in Slovenia, 86% in Lithuania and 59% in Estonia answered that they lived in a 'corrupt state.'⁴⁰

It should be reiterated that these indicators discussed above refer to the perception of corruption only. As far as the actual extent of corruption is concerned, the OSI report in 2002 concluded that 'there is still little comparative research available to provide clear evidence of the extent of corruption in candidate States, and no detailed comprehensive study of corruption in EU member and CEE States that would yield sufficient data to make serious comparisons.'⁴¹

2.2. Causes of corruption

There are two important factors that make the CEE countries particularly vulnerable to corruption: their communist heritage and the political and economic transformation that they are still going through. Corruption was an intrinsic part of the communist system. Paying bribes and depending on personal contacts was not only common, but sometimes the only way to arrange administrative dealings or gain access to basic goods and services. As Tanzi has observed, the centrally-planned economies '...experienced a great deal of corrupt practices', the vast majority of which were either ignored or not widely reported at the time.⁴²

⁴⁰ GfK Institute for Market Research Praha, (2003/2004) 'Corruption climate' including all CEE countries except for Latvia <http://www.gfk.hr/press_en/corrupti.htm> accessed 9 December 2007.

⁴¹ OSI Report (n 29), at 58.

⁴² Tanzi (n 28), at 5.

The political reforms in the CEE countries uncovered corruption that existed under the communist regime. According to the OSI report, the communist systems left behind the following patterns:

traditions of both high-level grand corruption and low-level petty corruption; entrenched mistrust of the State; a feeling of legitimacy among the population in circumventing the State (“beating the system”); widespread clientelism and forms of exchange that run against both formal political and bureaucratic norms and corruption in the private sector as a substitute for fair competition.⁴³

As Sajó has observed, corruption in Central and Eastern Europe was structural in the sense that it was part of the region’s clientelistic social structures, which were characteristic of communist regimes.⁴⁴ Sajó defined clientelism as ‘a network of social relations where personal loyalty to the patron prevails against the modern alternatives of market relations, democratic decision making, and professionalism in public bureaucracies.’⁴⁵ Such a clientelistic system of exchange emerged in the absence of effective markets.⁴⁶ An example of corruption based on such a clientelistic system would be when a public official abuses his office to reward his clients, perhaps by providing jobs to the clients of particular political groups in order to build his position in a political party.

After the demise of communism, the transition to democracy and a market economy brought about new types of corruption. In the World Bank’s assessment, ‘the simultaneous transition processes of building new political and economic institutions in the midst of a massive redistribution of state assets have created fertile ground for state capture and administrative corruption.’⁴⁷ Market liberalisation of the economy, which

⁴³ OSI Report (n 29), at 43.

⁴⁴ A. Sajó, ‘Corruption, Clientelism, and the Future of the Constitutional State in Eastern Europe’ (1998) *East European Constitutional Review*, Vol. 7 No. 2

<<http://www.law.nyu.edu/eecr/vol7num2/special/special.html>> accessed 9 December 2007.

⁴⁵ *Ibid.*

⁴⁶ OSI Report (n 29), at 43.

⁴⁷ World Bank (n 32), at xix.

used to be under exclusive control of the state, created new opportunities for corruption that did not exist under the previous economic system. One example is corruption related to the privatisation process. Officials who played a direct role in privatisation deals often took advantage of their position, sometimes by selling public assets at a low price in return for a bribe.⁴⁸ Among other factors facilitating corruption during the transition period were the underdeveloped civil society and the lack of accountability standards in public administration and the judiciary,

The CEE countries were undergoing simultaneous economic, legal, ideological and social transitions. They had to define new rules and new institutions to govern their economies and societies. As Holmes has pointed out, the scope of attempted change was 'one significant reason why most post-communist states have suffered a severe *legislative lag* in the past decade' (emphasis in original), which meant that laws have often been non-existent or vague and contradictory.⁴⁹ All that constituted a fertile ground for corruption. Moreover, the transition to democracy has been accompanied not only by the collapse of political and economic communist system, but also by a loss of belief in the old communist value system.⁵⁰ Some authors point out that such 'general deterioration of values' and the resulting 'moral wasteland' in post-communist countries was a prime cause of increased corruption among officials.⁵¹

Adding to the problem, the international context in which post-communism was born also contributed to the prevalence of corruption in the CEE countries.⁵² The

⁴⁸ See more: D. Kaufmann and P. Siegelbaum, 'Privatization and Corruption in the transition economies' (1997) *Journal of International Affairs*, Vol. 50 Issue 2, 419-458.

⁴⁹ L. Holmes, 'Corruption. Weak States and Economic Rationalism in Central and Eastern Europe' 9th International Anti-Corruption Conference (IACC) (South Africa, Durban, 1999)

⁵⁰ W. L. Miller, S. White and P. Heywood, *Values and Political Change in Postcommunist Europe*, (London: Macmillan, 1998) Chapter 4 quoted in W. L. Miller, Å.B. Grødeland and T. Y. Koshechkina, 'Bribery and Other Ways of Coping With Officialdom in Post-Communist Eastern Europe' in A.J. Heidenheimer and M. Johnston (eds), *Political Corruption: Concepts & Contexts* (3rd edn Transaction Publishers New Brunswick 2005), 559-580, at 561.

⁵¹ T. Verheijen and A. Dimitrova, 'Private interests and public administration: the Central and East European experience' (1996) *International Review of Administrative Sciences*, Vol. 62 No. 2, 197-218, at 212, quoted in W. L. Miller, Åse B. Grødeland and T. Y. Koshechkina (n 50).

⁵² More on this point, see: Holmes (n 49).

revolutions of 1989-91 in Central and Eastern Europe coincided with a recession in the West and with the rise of neo-liberal ideology, which can encourage corruption due to greater job insecurity for public officials and privatization.⁵³ As Holmes has explained, to the extent that some post-communist countries were influenced by this ideology, economic rationalism has been a factor encouraging official corruption.⁵⁴

2.3. The importance of combating corruption

Up until the 1990s, the damaging effects of corruption were not widely acknowledged. Quite to the contrary, some economists suggested that corruption actually raised economic growth. The central argument was that bribery could be '... an efficient way of getting around burdensome regulations and ineffective legal systems.'⁵⁵ It was claimed that corruption effectively allocates goods according to the willingness and ability to pay, therefore putting goods in the hands of people who value them the most and use them most efficiently.⁵⁶ Among other claims, one could find arguments saying that corruption is efficiency-enhancing because it removes government-imposed rigidities which impede investment; in other words it 'oils the mechanism' or 'greases the process.'⁵⁷ It was also argued that public officials work harder with the prospect of bribes, which in turn allows government to keep budget expenditure at lower levels.⁵⁸ At the time when these arguments were commonplace, it comes as no surprise that corruption was considered a legitimate part of business and in some countries it was even tax deductible.⁵⁹

⁵³ L. Holmes, 'Crime, Corruption, and Politics: Transnational Factors' in J. Zielonka and A. Pravda (eds), *Democratic Consolidation in Eastern Europe Volume 2: International and Transnational Factors*, (OUP, Oxford 2001), 192-230, at 207-208.

⁵⁴ Ibid.

⁵⁵ D. Kaufmann, 'Corruption: The Facts' (1997) *Foreign Policy*, No. 107, 114-131, at 115-116.

⁵⁶ Klitgaard (n 5), at 31

⁵⁷ Tanzi (n 28), at 25.

⁵⁸ T. G. Grosse, 'Działania anty-korupcyjne w państwach członkowskich OECD' (2000), at 9
<<http://www.batory.org.pl/ftp/program/przeciw-korupcji/pk0001.pdf>> accessed 10 December 2007.

⁵⁹ For example: France, Belgium, Denmark, Germany, see: Ibid, at 5.

Intensified research on corruption in the 1990s increased the awareness of its costs for economic, political and social development. The damaging consequences of corruption were finally widely acknowledged by economists. It was recognised that corruption lowers investment and economic growth⁶⁰ and might cause loss of tax revenue and diminish the quality of infrastructure and public services.⁶¹ Corruption was found to raise transaction costs and uncertainty in the economy and lead to inefficient economic outcomes.⁶² In 1997 the World Bank argued that:

There is increasing evidence that corruption undermines development. It also hampers the effectiveness with which domestic savings and external aid are used in many developing countries, and this in turn threatens to undermine grassroots support for foreign assistance. Corruption is of growing concern to donors, nongovernmental organizations, and governments and citizens in developing and industrial countries alike.⁶³

Furthermore, corruption has a destructive impact on the democratic systems, as it distorts the democratic decision-making process and undermines the legitimacy and the credibility of governments. As Heywood has observed, corruption attacks 'some of the basic principles on which democracy rests – notably, the equality of citizens before institutions... and the openness of decision making...'⁶⁴ Corruption replaces just and predictable legal systems and other critical social structures that lie between individuals and the state with less formal and less predictable rules that may well change from case to case.⁶⁵

In the post-communist countries, which were much more fragile than long-established democracies, the social and political costs of corruption were potentially

⁶⁰ P. Mauro, 'Corruption and growth' (1995) *The Quarterly Journal of Economics*, Vol. 110 No. 3, 681-712, at 683.

⁶¹ P. Mauro, 'Why worry about corruption' (1997) *Economic Issues* 6, International Monetary Fund, at 7 <<http://www.imf.org/external/pubs/ft/issues6/issue6.pdf>> accessed 10 December 2007.

⁶² Ch. W. Gray and D. Kaufmann, 'Corruption and Development' (1998) *Finance & Development*, 7-10, at 8.

⁶³ World Bank (n 12), at 1.

⁶⁴ P. Heywood, 'Political Corruption: Problems and Perspectives' (1997) *Political Studies*, XLV, 417-435, at 421.

⁶⁵ United Nations (n 16), at 5.

more destructive.⁶⁶ Corruption could still undermine the success of the post-communist transitions. It destroys support for democracy, therefore undermines the driving force behind reforms.⁶⁷ Corrupt governments lose the legitimacy they need to conduct vital reforms. As Heymann has pointed out, a critical relationship between corruption and democracy is that corruption can deeply undermine support for democracy in any fragile democracy and 'where democracy is younger and more fragile, corruption seems a reason to abandon democracy completely in favor of some form of other government that, it is hoped, will be free of that vice.'⁶⁸

This partly explains the rise of the populist parties in the CEE countries, where the credibility of governments has begun to depend '...on the intensity of their commitments to fight corruption.'⁶⁹ In 1998 Krastev pointed out that '...an anti-corruption campaign is a very useful platform for attacking reformist policies and reform-minded governments' and '...anti-corruption rhetoric... may abet the rise of populist and anti-reformist alternatives.'⁷⁰ Examples of populist parties that came to power in the CEE countries promising to end corruption include the Self Defence party in Poland and Vladimir Meciar's party in Slovakia.⁷¹ At the same time, however, these parties resisted more radical economic reforms and liberalisation of markets, which shows no recognition that in order to minimise corruption, the role of the state in the economy and related opportunities for self-enrichment among officials must be reduced.⁷²

⁶⁶ L. Holmes, 'Corruption and the crisis of the post-communist state' (1997) *Crime, Law & Social Change* 27: 1997, 275-297, at. 276.

⁶⁷ World Bank (n 32), at xiv.

⁶⁸ P.B. Heymann, 'Democracy and Corruption' (1996-1997) 20 *Fordham Int'l L. J.*, 323- 346, at 327-328.

⁶⁹ I. Krastev, 'Dancing with Anticorruption' (1998) *East European Constitutional Review*, Vol. 7 No 3 <<http://www.law.nyu.edu/eecr/vol7num3/special/corruption.html>> accessed 10 December 2007

⁷⁰ Ibid.

⁷¹ 'Populist watch' *The Economist* 7 April 2004.

⁷² M.L. Tupy, 'The Rise of Populist Parties in Central Europe. Big Government, Corruption, and the Threat to Liberalism' (2006) CATO Institute, Centre for Global Liberty & Prosperity Development Policy Analysis, No. 1, at 12 <<http://www.cato.org/pubs/dpa/dpa1.pdf>> accessed 6 December 2007.

In summary, corruption could endanger the achievements of political and economic transitions in the CEE countries as officials could influence newly established policies and laws to secure their own interests. It could compromise the efficiency of economic activity and distort public perceptions of how a proper market economy works, making the transition to free market democracy far more difficult.⁷³ As Chapter Four will discuss, the EU acknowledged the dangers that corruption poses for the ongoing transformation in the CEE countries, and as a result, democratic and anti-corruption reforms were to a great degree interrelated in the accession process.

3. Corruption as an international policy problem

3.1. The context

Initially, corruption was considered to be a problem for domestic policies, which did not require a response at the international level. However, in the 1990s it attracted considerable attention and turned into a truly global political issue. This can be explained by four key factors: the end of the Cold War, globalisation, the rising influence of NGOs, and a wave of bribery scandals worldwide.

First, the collapse of the Cold War political system ended a tendency to overlook obvious cases of corruption as long as particular countries were in the right political camp.⁷⁴ With the end of the bipolar struggle that dominated global politics, there was ‘...a marked decrease in the willingness of the public to tolerate corrupt practices by their political leaders and economic elites.’⁷⁵ Democracy spread to new places, bringing greater independence for the media and prosecution services. These in turn exposed the extent of corruption, which could no longer be tolerated.

⁷³ P. Glynn, S. J. Kobrin and M. Naím, ‘The Globalization of Corruption’ in K. A. Elliott (ed) *Corruption and the Global Econom* (Institute for International Economics, Washington DC, 1997), 7-27, at 10.

⁷⁴ Tanzi (n 28), at 4.

⁷⁵ Glynn, Kobrin and Naím (n 73), at 8.

The second important factor was globalisation, which opened up new frontiers not only for trade and business, but also for corrupt practices. As Tanzi has noted, globalisation has brought individuals from countries with little corruption into frequent contact with those from countries where corruption is endemic and these contacts have increased the international attention paid to corruption.⁷⁶ Globalisation not only increased the opportunities for corrupt practices, but also made their detection more difficult due to the proliferation of electronic commerce and offshore financial centres.⁷⁷ This made international cooperation to act against corruption more urgent than ever before.

Third, the 1990s also witnessed the dissemination of the anti-corruption standards by the international agencies. In this context, it is important to emphasise the role of Transparency International, set up in 1993, which is a non-governmental agency independent of both national governments and international organizations. It is comprised of a global network of more than 90 locally established national chapters.⁷⁸ Over the years, Transparency International has played an important role in publicising the damaging effects of corruption and encouraging governments to implement more robust anti-corruption standards.

Fourth, a wave of bribery scandals across the world changed the rich world's perception of corruption. This revealed that the problem of corruption was not confined to the developing countries, but affected the well-established democracies as well. In Western Europe, during the 1980s and the start of the 1990s, '...corruption no longer appeared to be a marginal or exceptional but was seen as an endemic problem.'⁷⁹

⁷⁶ Tanzi (n 28), at 5.

⁷⁷ J. W. Williams and M. E. Beare, 'The business of bribery: Globalization, economic liberalization, and the "problem" of corruption' (1999) *Crime, Law & Social Change* 32, 115-146 at 119.

⁷⁸ See: <http://www.transparency.org/about_us> last accessed 26 October 2007.

⁷⁹ D. Della Porta and Y. Mény, 'Introduction' in D. Della Porta and Y. Mény (ed.), *Democracy and Corruption in Europe* (Pinter 1997), 1-6, at 4.

Greater attention to the problem of corruption may also be driven by the fact that the extent of corruption increased in the 1990s. Such an argument was discussed by Tanzi, who distinguished three main factors that may have contributed to the rise of corruption over that decade: the increased role of the government in the economy, the growth of international trade and business and the economic changes in transition countries.⁸⁰ However, others argue that there is no credible evidence that corruption actually increased during the 1990s.⁸¹

3.2. Evolution of international cooperation

International organisations engaged actively in the fight against corruption when its damaging consequences on political and economic systems were recognised in the 1990s. In 1998, Brademas and Heimann wrote that ‘after years of being tolerated with a mixture of apathy, cynicism, and denial, corruption is becoming a target of serious international action.’⁸² In reality, though, international efforts against corruption evolved through several stages over time.

The first efforts at international cooperation in the fight against corruption focused on developing a legal approximation of the offence of corruption. One of the reasons for that was the need to ensure effective cooperation among countries in investigating and prosecuting cases of corruption, which traditionally is governed by the principle of ‘double criminality’, a rule where acting on a request for assistance under extradition or mutual assistance agreements from another country depends on whether an act constitutes a criminal offence in both the requesting and the requested state. However, as Pieth has pointed out, behind the initiatives in this area, in addition to a

⁸⁰ Tanzi (n 28), at 6-8.

⁸¹ Williams and Beare (n 77), at 126.

⁸² J. Brademas and F. Heimann, ‘Tackling International Corruption. No longer Taboo’ (1998) 77 Foreign Affairs 1998, 17- 22, at 17.

search for legal harmony, there was also a mixture of economic interests and moral climate.⁸³

At the beginning, initiatives focused on bribery in the context of international trade. The first measure in this area was the United States Foreign Corrupt Practices Act (FCPA), adopted in 1977, which was a national measure prohibiting the bribery of foreign officials by American companies. However, as Carver has pointed out, the adoption of the FCPA did not come from any high moral principle, but rather from concerns that unacceptable share price volatility resulted from the reliance of companies on major contracts that were often induced by bribes.⁸⁴

At the instigation of the United States, the Organisation for Economic Cooperation and Development Convention (OECD) took one of the first multilateral initiatives against corruption.⁸⁵ In 1996 the OECD adopted a Recommendation on the tax deductibility of bribes to foreign public officials.⁸⁶ This Recommendation called on member countries to deny such deductibility. The reasons behind the adoption of this measure were purely economic. Tax deductibility of bribes distorted fair competition, as the countries which allowed it gained an unfair advantage over countries where such deductibility was not allowed.

Following this, in 1997 the Convention on Combating Bribery of Foreign Public Officials in International Transactions (the OECD Convention) was adopted.⁸⁷ The OECD Convention was signed as a result of pressure by the United States to introduce rules disallowing companies to bribe foreign public officials in order to obtain or retain

⁸³ M. Pieth, 'The Harmonization of Law Against Economic Crime' (1999) *European Journal of Law Reform*, Vol. 1 No. 4, 527-551, at 535.

⁸⁴ J. P. Carver, 'Combating Corruption: the Emergence of New International Law' (2003), *International Law FORUM du droit international* 5, 119-123, see footnote 1 at 119.

⁸⁵ Glynn, Kobrin and Naím (n 72), at 19-20.

⁸⁶ OECD, 'Recommendation of the Council on the tax deductibility of bribes to foreign public officials' (1996) <<http://www.oecd.org/dataoecd/4/18/38028044.pdf>> accessed 10 December 2007.

⁸⁷ OECD, 'Convention on Combating Bribery of Foreign Public Officials in International Transactions' (adopted 21 November 1997, entered into force 15 February 1999) (the OECD Convention) <<http://www.oecd.org/dataoecd/4/18/38028044.pdf>> accessed 10 December 2007.

international contracts. It entered into force in 1999 and has been ratified by 37 countries.⁸⁸ The OECD Convention focuses on the supply-side of corruption and is limited to the criminalisation of active corruption of foreign public officials.⁸⁹ The state parties are required to introduce the liability of legal persons, although here, depending on national arrangements, criminal responsibility is not required.⁹⁰

An important goal of the OECD Convention is to ensure that the countries cooperate with each other for the purposes of investigating and prosecuting bribery and, in particular, they are not allowed to refuse to cooperate on grounds of bank secrecy.⁹¹ The parties are also obliged to make bribery of foreign officials an extraditable offence and prosecute in cases where national laws make it not possible to extradite a country's nationals.⁹²

The OECD Convention addresses corruption in the very narrow context of international trade and treats corruption as an obstacle to international investment. This approach reflects the limited mandate of the OECD. The OECD Convention does not require state parties to criminalise acts of bribery of national officials or acts involving a bribe paid for purposes unrelated to international business.⁹³ The objective was to include all major trade competitors into a common anti-corruption agreement and ensure a fair playing field for international business.

⁸⁸ See chart of ratifications, as of 19 June 2007 at: <<http://www.oecd.org/dataoecd/59/13/1898632.pdf>> accessed 10 December 2007.

⁸⁹ Article 1(1) of the OECD Convention.

⁹⁰ Article 2 and 3(2) of the OECD Convention.

⁹¹ Article 9 of the OECD Convention.

⁹² Article 10 of the OECD Convention.

⁹³ Heidenheimer and Moroff observed that 'bribery as defined by the OECD convention relates only to payments made in order to retain and obtain business, which therefore excludes bribes paid to avoid taxes, customs duties, judicial or other regulatory obligations.' See A.J. Heidenheimer and H. Moroff, 'Controlling Business Payoffs to Foreign Officials: The 1998 OECD Anti-Bribery Convention' in A.J. Heidenheimer and M. Johnston (eds), *Political Corruption: Concepts & Contexts* (3rd edn Transaction Publishers New Brunswick 2005), 943-959, at 953.

The OECD Convention addressed corruption only to the extent where the corrupt officials constituted an impediment to market access⁹⁴ and in this sense it resembles a trade treaty. As Brademas and Heimann have pointed out, 'the OECD is the ideal forum for tackling the supply side of international corruption because its member states are the home bases of nearly all important international companies.'⁹⁵ This is confirmed in Article 15 of the OECD Convention, which provides that this convention enters into force when it is ratified by five of the ten countries which have the ten largest export shares and which represent by themselves at least sixty per cent of the combined total exports of those ten countries.

Despite the success in ratification of the OECD Convention, ten years after its adoption, Transparency International argued that as a result of the lack of political will on the part of the states parties, the impact of the OECD Convention remained limited. In more than half of the signatory countries, there was little or no enforcement of the prohibition against foreign bribery.⁹⁶ Despite a great number of investigations, only a few of them have led to convictions.⁹⁷ However, as Pieth has noted, the criminal side of the OECD Convention should not be emphasised too much, because the actual goal was to mobilize companies to develop preventive concepts.⁹⁸ The focus on prevention is visible in Article 8 of the OECD Convention, which obliges the state parties to establish accounting and auditing standards for companies to prevent off-the-books accounts. In addition, the OECD adopted a number of non-binding recommendations which aim at

⁹⁴ Pieth (n 83), at 536.

⁹⁵ Brademas and Heimann (n 82), at 19.

⁹⁶ For a detailed account of the enforcement of the OECD Convention, see: Transparency International 'Progress Report 2007: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions', at 6

<http://www.transparency.org/news_room/in_focus/2007/oecd> accessed 10 December 2007.

⁹⁷ As of 21 November 2007 there were more than 150 ongoing foreign bribery investigations and at least 30 individuals and companies that committed foreign bribery have been penalized. Some countries, however, have almost no investigations and they have brought no cases to court. See: A. Gurría, 'The Tenth Anniversary of the OECD Anti-Bribery Convention: its Impact and its Achievements' (Speech in Rome, 21 November 2007)

<http://www.oecd.org/document/37/0,3343,en_2649_37447_39656933_1_1_1_37447,00.html> accessed 10 December 2007.

⁹⁸ Interview with M. Pieth, the Chair of the Working Group on Bribery (2007)

<<http://viphttp.yacast.net/viewontv/ocde/bribery.mp3>> accessed 10 December 2007.

enhancing integrity and transparency in the private and public sectors, including 1997 Recommendation on Combating Bribery in International Business Transactions and Guidelines for Multinational Enterprises.⁹⁹

The enforcement of the OECD Convention was seriously undermined in 2006 by a dangerous precedent set by the United Kingdom. In the so called 'Al-Yamamah investigation', the arms company BAE allegedly paid a bribe to a member of the Saudi Arabia ruling clan in order to obtain a contract.¹⁰⁰ The anti-corruption investigation was, however, discontinued by the British government in 2006 for national security reasons.¹⁰¹ Such a stance by the United Kingdom threatens the effectiveness of the OECD Convention and '...creates an open-ended loophole that other countries could readily use.'¹⁰²

The OECD Convention has had a 'knock-on effect' on the development of further international instruments against corruption.¹⁰³ International cooperation against corruption was subsequently taken a step further with the adoption of the Council of Europe anti-corruption instruments. Since the very beginning, the Council of Europe has addressed corruption as a serious threat to democracy, the rule of law and human rights.¹⁰⁴ At the pan-European level, it remains the most active organization addressing the problem of corruption across countries. Council of Europe initiatives aim to cover all aspects of the international fight against corruption and try to set Europe-wide anti-corruption standards by way of treaties, recommendations and resolutions.

⁹⁹ OECD, 'Revised Recommendation of the Council on Combating Bribery in International Business Transactions' (1997) <<http://www.oecd.org/dataoecd/4/18/38028044.pdf>>; 'The OECD Guidelines for Multinational Enterprises' (Revised in 2000) <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>; 'The 1998 Recommendation on Improving Ethical Conduct in the Public Service' (1998) <<http://www.oecd.org/dataoecd/60/13/1899138.pdf>>; 'Recommendation on Guidelines for Managing Conflict of Interest in the Public Service' (2003) <<http://www.oecd.org/dataoecd/31/56/36587292.pdf>> accessed 10 December 2007.

¹⁰⁰ 'BAE accused of secretly paying £1bn to Saudi prince' *The Guardian* (7 June 2007).

¹⁰¹ B.W. Heinemann and F. Heimann, 'Arrested Development: The fight against international corporate bribery' (2007) *The National Interest*, Nov./Dec., 80- 87, at 80.

¹⁰² Transparency International (n 96), at 35.

¹⁰³ Holmes (n 53), at 224.

¹⁰⁴ Council of Europe, 'Threat to Europe from economic crime' (1997), Doc. 7971

<http://www.coe.int/t/dg1/greco/documents/otherbasictxts_en.asp> accessed 10 December 2007.

The Council of Europe Criminal Law Convention on Corruption (Criminal Law Convention)¹⁰⁵ was adopted in 1999 and has a much broader scope than the OECD Convention, as it focuses on criminalisation of active and passive bribery of public officials, including national and foreign officials, officials of international organisations, and members of national and foreign public assemblies.¹⁰⁶ Next to bribery, it also covers trading in influence, a form of corruption whereby an undue advantage is given to anyone who asserts influence over a public official.¹⁰⁷ In addition, the Criminal Law Convention provides protection of informants cooperating with investigating and prosecuting authorities¹⁰⁸ and obliges the state parties to ensure the independence of anti-corruption bodies.¹⁰⁹ Similarly to the OECD Convention, this convention aims to improve international cooperation in mutual legal assistance and extradition in cases of corruption.¹¹⁰

The Council of Europe also adopted the first international instrument that defines common rules for civil litigation in cases of corruption. The Civil Law Convention on Corruption (Civil Law Convention)¹¹¹ was adopted in 1999 and obliges the state parties to provide effective remedies for persons who have suffered damage as a result of corruption, including full compensation for such damage.¹¹² The damage can be compensated for if the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent corruption.¹¹³ Both the public and private sectors are covered. The Civil Law Convention also addresses the prevention of corruption and obliges the state parties to ensure protection of employees who report

¹⁰⁵ Council of Europe (n 20).

¹⁰⁶ Article 2 -11 of the Criminal Law Convention.

¹⁰⁷ Article 12 of the Criminal Law Convention.

¹⁰⁸ Article 22 of the Criminal Law Convention.

¹⁰⁹ Article 20 of the Criminal Law Convention.

¹¹⁰ Chapter IV of the Criminal Law Convention.

¹¹¹ Council of Europe, Civil Law Convention on Corruption, ETS No.: 174 (adopted 4 November 1999, entered into force 1 November 2003) (the Civil Law Convention)
<<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=174&CM=1&DF=7/11/2007&CL=ENG>> accessed 6 December 2007.

¹¹² Article 2 and 3 of the Civil Law Convention.

¹¹³ Article 4 of the Civil Law Convention.

corruption in good faith to authorities and introduce national laws on auditing and accounting for companies.¹¹⁴

Apart from the above legal developments, during the 1990s international agreement emerged on some key anti-corruption principles that should underpin national anti-corruption strategies. At the pan-European level, the Council of Europe's Twenty Guiding Principles for the Fight Against Corruption (Twenty Guiding Principles)¹¹⁵ constitute the most comprehensive document in this area. They encompass not only the criminalisation of corruption but also preventive measures, such as raising public awareness and ethical behaviour, independence of the judiciary and prosecution, limitation of immunity for public officials, specialisation of persons and bodies in charge of fighting corruption, transparent and efficient public administration, codes of conduct for public official, appropriate auditing procedures, regulation of political party financing and freedom of the media (See Appendix 1). The Twenty Guiding Principles are not binding, but the national authorities are called to take them into account when constructing their national policies against corruption. They are formulated in a general way and thus can be adapted to the specific needs and priorities in every country. The Twenty Guiding Principles are complemented by two recommendations of the Council of Europe, which define common rules against corruption in the funding of political parties and electoral campaigns¹¹⁶ and a model code of conduct for public officials.¹¹⁷

At the global level, corruption was initially addressed indirectly in the UN Convention Against Transnational Crime (UNCATOC)¹¹⁸ adopted in 2000. This

¹¹⁴ Article 9 of the Civil Law Convention.

¹¹⁵ The Council of Europe, 'Resolution (97) 24 on the Twenty Guiding Principles For the Fight Against Corruption' (1997) <[http://www.coe.int/t/dg1/greco/documents/Resolution\(97\)24_EN.pdf](http://www.coe.int/t/dg1/greco/documents/Resolution(97)24_EN.pdf)> accessed 10 December 2007.

¹¹⁶ Council of Europe, 'Recommendation (2003)4 of the Committee of Ministers to member states on common rules against funding of political parties and electoral campaigns' (2003) <[http://www.coe.int/t/dg1/greco/general/Rec\(2003\)4_EN.pdf](http://www.coe.int/t/dg1/greco/general/Rec(2003)4_EN.pdf)> accessed 10 December 2007.

¹¹⁷ Council of Europe, 'Recommendation (2000) 10 on codes of conduct for public officials' (2000) <[http://www.coe.int/t/dg1/greco/documents/Rec\(2000\)10_EN.pdf](http://www.coe.int/t/dg1/greco/documents/Rec(2000)10_EN.pdf)> accessed 10 December 2007.

¹¹⁸ United Nations, 'United Nations Convention Against Transactional Organised Crime' Resolution 55/25 (adopted 15 November 2000, entered into force 29 September 2003) (the UNCATOC)

convention included several provisions relating to preventing and combating public sector corruption. In particular, it foresaw the criminalisation of corruption of public officials¹¹⁹ and liability of legal persons involved in corrupting public officials.¹²⁰ Apart from criminalisation, the UNCATOC also put stress on the prevention of corruption by obliging the state parties to promote the concept of 'integrity' among public officials and recommending that they ensure the independence of anti-corruption bodies.¹²¹

A more recent international agreement in bringing together the elements of a strategy against corruption was developed in 2003 with the adoption of UNCAC, which entered into force in 2005. The UNCAC is the first global agreement and the most comprehensive international instrument against corruption. The preamble to the UNCAC recognised that corruption constitutes a threat 'to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law' and that 'corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.'¹²²

The scope of criminalisation foreseen by the UNCAC is broader than in any previous international instrument in this area. In addition to domestic and cross-border bribery, the state parties are required to criminalise embezzlement, trading in influence and abuse of functions.¹²³ Similar to the OECD and the Council of Europe instruments, the UNCAC lays down the rules for mutual legal assistance and extradition in case of offences prescribed by it.¹²⁴ Furthermore, it is the first instrument which provides for

<http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf>
accessed 10 December 2007.

¹¹⁹ Article 8 of the UNCATOC.

¹²⁰ Article 10 of the UNCATOC.

¹²¹ Article 9 of the UNCATOC.

¹²² United Nations (n 19).

¹²³ Articles 15-19 of the UNCAC.

¹²⁴ Chapter IV of the UNCAC.

cooperation in the return of illicit funds deposited by corrupt officials in foreign banks to the countries of origin.¹²⁵

Most importantly, however, the UNCAC includes a wide range of preventive measures against corruption in the public and private sectors. As far as the public sector is concerned, the provisions relate to the establishment of preventive anti-corruption bodies, the promotion of integrity in public administration, the adoption of codes of conduct, ensuring transparency in public procurement and the management of public finances and enhancing the independence of the judiciary and prosecution.¹²⁶ In the private sector, the state parties are asked to take a wide range of actions, which include promoting high auditing and accounting standards, recommending adoption of codes of conduct and the use of good commercial practices.¹²⁷ The UNCAC also calls on state parties to promote participation of civil society in the fight against corruption.¹²⁸

The UNCAC constitutes a blueprint for devising national and international initiatives in this area. However, a closer look at its provisions reveals that some of them do not have a binding character. For example, the state parties are only asked to 'consider' criminalisation of bribery and embezzlement in the private sector.¹²⁹ In addition, most of the preventive measures are non-mandatory. For example, the state parties are only required to 'consider' taking appropriate measures to enhance transparency in the funding of political parties.¹³⁰

Apart from the above anti-corruption instruments, the international community also approached corruption indirectly through anti-money laundering legislation. During the 1990s, the international anti-money laundering regime was gradually extended to embrace the proceeds of corruption. When the regime was first established, corruption

¹²⁵ Chapter V of the UNCAC.

¹²⁶ Articles 7, 8, 9, 11 of the UNCAC.

¹²⁷ Article 12 of the UNCAC.

¹²⁸ Article 13 of the UNCAC.

¹²⁹ Article 22 of the UNCAC.

¹³⁰ Article 7(3) of the UNCAC.

was excluded from the anti-money laundering legislation. The first international measure in this area that imposed an obligation to criminalise acts of money laundering, the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted in 1988, was limited to drug offences.¹³¹ Soon after, however, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime was adopted in 1990 and extended criminalisation to any criminal offence as a result of which proceeds were generated, thereby including corruption.¹³²

The most comprehensive anti-money laundering framework was developed by the Financial Action Task Force on Money Laundering (FATF), an inter-governmental body established by the G7-Summit in 1989. In 1990 FATF first drafted a series of non-binding Forty Recommendations¹³³, which were then revised in 1996 and 2003, to ensure that they remain up to date and relevant to the evolving threat of money laundering. The Forty Recommendations have been reflected in laws at both national and international levels, including, as will be discussed in subsequent chapters, the EU measures. Since 1996, the Forty Recommendations have suggested that countries should apply the crime of money laundering to all serious offences.¹³⁴

At the same time, it has been recognised that any comprehensive strategy against corruption must include measures aimed at preventing and controlling the laundering of funds stemming from corruption. The link between corruption and money laundering is

¹³¹ Article 3(1)(b) United Nations, 'Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (adopted 19 December 1988, entered into force 11 November 1990) <http://www.unodc.org/pdf/convention_1988_en.pdf> accessed 10 December 2007.

¹³² Article 1(e) Council of Europe, ETS No.: 141 (adopted 8 November 1990, entered into force 1 September 1993) <<http://conventions.coe.int/treaty/en/Treaties/Html/141.htm>> accessed 10 December 2007. This Convention is now replaced by the 2005 Council of Europe 'Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism' ETS No.: 198 (adopted 16 May 2005, not yet in force) <<http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm>> accessed 10 December 2007.

¹³³ FATF, 'The Forty Recommendations' (revised 2003) <http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html#40recs> accessed 10 December 2007.

¹³⁴ Ibid, see: Recommendation 1.

now explicit in the international anti-corruption instruments. In particular, the OECD Convention, the Criminal Law Convention and the UNCAC all contain provisions on criminalisation of laundering of proceeds from corruption offences.¹³⁵ Chapter Three will demonstrate that this principle is also reflected at the EU level.

The offences of corruption and money laundering are strongly correlated. Money laundering can be defined as a process whereby proceeds from a crime are manipulated in a way that conceals their illicit source.¹³⁶ The anti-money laundering measures contribute to the fight against corruption in two important ways: by reducing incentives and by using their extraterritorial reach to expose corruption where it may not otherwise be uncovered.

First, anti-money laundering measures reduce the incentive to engage in corruption by taking away the economic gain derived from corruption. Corruption is committed for profit, and criminals will often try to disguise the illegal origin of their wealth. Corrupt individuals often rely on money laundering techniques to hide the illegal origin of their wealth. Anti-money laundering measures aim at tracing the origin of money and preventing the criminals from reintegrating their illegitimate gains back into the legitimate economy. As Shams has pointed out, 'creating corruption as a predicate offence for money laundering helps prevent the corrupt from maintaining their façade of legitimacy and expose their corruption.'¹³⁷

Second, the international anti-money laundering measures have an extraterritorial reach, which helps to uncover cases of corruption taking place in third countries. For example, the 2005 Council of Europe Convention on Laundering, Search, Seizure and

¹³⁵ Article 7 of the OECD Convention, Article 13 of the Criminal Law Convention and Article 14 and 23 of the UNCAC.

¹³⁶ For an overview, see: W. C. Gilmore, *Dirty Money: The evolution of international measures to counter money laundering and the financing of terrorism* (3rd edn, Council of Europe Publishing, 2004), at 29-46.

¹³⁷ H. Shams, 'Using Money Laundering Control to Fight Corruption: An Extraterritorial Instrument' (2000) *Essays in International Financial & Economic Law*, No. 27, at 43.

Confiscation of the Proceeds from Crime and on the Financing of Terrorism establishes that 'it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party.'¹³⁸ This means that it is still an offence to launder the proceeds from corrupt acts, even if these acts occurred outside the country where the laundering takes place. The laundering of proceeds abroad has been a practice of many corrupt officials across the world. For example, in 1999 the *Economist* noted that African leaders had \$20 billion on deposit in Swiss banks alone.¹³⁹

3.3. The importance of international cooperation

Why can anti-corruption strategy not be confined only to national measures? Why should the fight against corruption not be treated purely as an internal problem of countries? During the 1990s, an agreement was reached that corruption needs to be addressed at both national and international levels. It was recognised that the international cooperation can boost the will and capacity to fight corruption in several important ways.

First, international cooperation becomes indispensable as soon as criminals move across the borders. There is a need for cooperation in the investigation and prosecution of cross-border cases of corruption and a degree of approximation for the purposes of effective mutual legal assistance and extradition. As Chapter Three will discuss, the need for cooperation against cross-border crime became particularly visible and is best illustrated in the context of the EU.

Second, international cooperation makes it possible to agree on criminalisation of some forms of corruption. The best example here is the criminalisation of bribery of foreign officials, which had to be initiated at the international level because individual countries were reluctant to prosecute their own companies who obtained profitable

¹³⁸ Article 9(2)(a) Council of Europe (n 131).

¹³⁹ 'A global war against bribery' *The Economist* (14 January 1999).

contracts abroad, even if it occurred as a consequence of bribery. In addition, countries did not want to put their own companies at an economic disadvantage in comparison to companies from other countries, where such bribery was sometimes allowed.

Third, the involvement of the international community may be necessary when countries are not able to deal with the problem of corruption alone. In extreme cases, international pressure can be the only driver behind reforms. International institutions can finance or assist in drafting specific reforms projects, such as public administration reform and public finances management.¹⁴⁰ Also, external pressure can generate the political will inside countries and put pressure on national governments to step up the fight against corruption. This pressure can be particularly effective if countries rely on external financial assistance. For example, in the 1990s the World Bank and International Monetary Fund have introduced reforms to their lending practices, making the provision of funds conditional upon the successful implementation of anti-corruption reforms. As will be discussed in subsequent chapters, the EU used similar conditionality to affect political and economic reforms in the candidate countries. The World Bank, in particular, focuses not only on preventing corruption in the projects it finances, but also helps countries that request assistance in combating corruption.¹⁴¹

Finally, international cooperation helps to disseminate best practices in preventing and combating corruption. Countries are able to share experiences and learn about successful anti-corruption policies in other countries. International agencies with a cross-country expertise can also assist in drafting more effective anti-corruption strategies.

¹⁴⁰ S. Rose-Ackerman, *Korupcja i rzędy* (Fundacja im. Stefana Batorego i Wydawnictwo Sic! 2001), at 334-338.

¹⁴¹ World Bank (n 12), at 3.

3.4. Monitoring mechanisms

The adoption of international anti-corruption instruments was an important accomplishment, but it was not an end in itself. The challenge was to ensure that national governments would actively enforce these instruments. To this end the international organisations set up various monitoring mechanisms to oversee their correct and timely implementation. Monitoring refers to an international review process to assess whether national governments have taken adequate action to implement provisions of a relevant international instrument.¹⁴² Effective monitoring mechanisms are crucial for the success of anti-corruption instruments. As Brademas and Heimann have pointed out, monitoring of compliance with high standards prevent regulation from falling to the lowest common denominator.¹⁴³ The importance of such a system has been recently highlighted in the context of the UNCAC, but it applies to all international instruments. As has been pointed out:

If UNCAC is properly implemented it will result in major reductions in corruption, producing great benefits in terms of better democratic governance, accelerated international development, more efficient government procurement, stronger competition, and alleviation of poverty around the world. An effective follow-up process ensures that such implementation will take place and that the goals of UNCAC can be achieved. Without follow-up there is a high risk that UNCAC will become another example of the futility of high aspirations.¹⁴⁴

A good example demonstrating the need for an appropriate monitoring mechanism is the Organisation of American States (OAS) Convention Against Corruption¹⁴⁵ adopted in 1996. Until four years after its entry into force, there was no monitoring of the OAS

¹⁴² F. Heimann and G. Dell, 'Report on the Follow-up Process for UN Convention Against Corruption' (Transparency International, 2006), at 1
<http://www.transparency.org/global_priorities/international_conventions/projects_conventions/uncac/uncac_monitoring_report> accessed 10 December 2007.

¹⁴³ Brademas and Heimann (n 82), at 19.

¹⁴⁴ Heimann and Dell (n 142), at 6.

¹⁴⁵ Organisation of American States, 'Inter-American Convention Against Corruption' (adopted 29 March 1996, entered into force 6 March 1997) <<http://www.oas.org/juridico/english/Treaties/b-58.html>> accessed 10 December 2007.

Convention and the governments took little action against corruption. However, governments' efforts were finally stimulated in 2001 when monitoring began.¹⁴⁶

In Europe, there are two monitoring mechanisms in the area of anti-corruption developed by the OECD and the Council of Europe. They are based on a system of peer review, which can be defined as the 'systematic examination and assessment of the performance of a State by other States with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with established standards and principles.'¹⁴⁷ These mechanisms do not entail legal sanctions but rely on peer pressure, a form of mutual persuasion to comply with the relevant standards.

The OECD monitoring system is run by the Working Group on Bribery (OECD WG) composed of government experts from participating countries. It evaluates compliance with the OECD Convention and a non-binding 1997 Recommendation on Combating Bribery in International Business Transactions.¹⁴⁸ The purpose is to evaluate in a systematic way whether the national government is implementing laws that meet the standards set by the OECD instruments. The OECD WG meets five times a year to monitor compliance with the OECD instruments. The monitoring process is divided into two main phases. The first phase involves a paper analysis of law and an assessment of the conformity of the national laws with the OECD instruments.¹⁴⁹ In the second phase a questionnaire is sent out and intensive meetings take place in the examined country with government, law enforcement authorities, business, trade unions and NGOs.¹⁵⁰ The reports are prepared after nine months of intense discussion and include

¹⁴⁶ Heimann and Dell (n 142), at 5.

¹⁴⁷ F. Pagani, 'Peer Review: A Tool for Co-Operation and Change. An Analysis of an OECD Working Method' (2002) SG /LEG(2002) 1, OECD, at 4-5 <<http://www.oecd.org/dataoecd/33/16/1955285.pdf>> accessed 10 December 2007.

¹⁴⁸ For information concerning the OECD WG mandate see: <http://www.oecd.org/document/5/0,3343,en_2649_34855_35430021_1_1_1_1,00.html#Mandate> accessed 10 December 2007.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

recommendations for improvement.¹⁵¹ The OECD reports are public and constitute a valuable source of information about the general anti-corruption policies in the examined countries. They are very detailed and very often examine individual cases of corruption.

Even though the scope of the OECD instruments is narrow, the OECD WG reports go even further and make a general assessment of a government's initiatives and the anti-corruption development in the evaluated country. The OECD WG has no power to discipline or exclude members for breaching the OECD instruments, but instead relies on peer pressure to persuade governments to comply with the relevant standards. It has been argued that the OECD WG should increase the effectiveness of its action by issuing annual reports that compare and contrast national enforcement in order to hold governments fully accountable and increase the peer pressure.¹⁵²

The Council of Europe Group of States Against Corruption (GRECO) was established in 1999 to monitor the observance of the Twenty Guiding Principles and the implementation of the Criminal Law Convention, the Civil Law Convention on corruption, and two recommendations on codes of conduct for public officials and the funding of political parties. The aim of GRECO is to '...improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field'¹⁵³, rather than to ascertain compliance with the Council of Europe instruments.¹⁵⁴ Similarly to

¹⁵¹ OECD WG Reports

<http://www.oecd.org/document/24/0,2340,en_2649_37447_1933144_1_1_1_37447,00.html> accessed 10 December 2007.

¹⁵² Heinemann and Heimann (n 101), at 85.

¹⁵³ Article 1 of the Statute of GRECO, Council of Europe, Appendix to Resolution (99) 6

<http://www.coe.int/t/dg1/greco/documents/statute_en.asp> accessed 10 December 2007.

¹⁵⁴ J. Polakiewicz, 'Alternatives to Treaty-Making and Law-Making by Treaty and Expert Bodies in the Council of Europe' in R. Wolfrum and V. Röben (eds) *Developments of International Law in Treaty Making* (Springer 2005), 245-290, at 286.

OECD WG, GRECO monitors through mutual evaluation and peer pressure.¹⁵⁵ The evaluation is conducted in rounds.¹⁵⁶ It involves the collection of information through questionnaires and on-site country visits, as well as drafting of the evaluation reports.¹⁵⁷ These reports are open to the public and contain recommendations for the evaluated countries in order to improve their level of compliance with the provisions under consideration. The major strength of GRECO monitoring is that the implementation of recommendations is under scrutiny after the adoption of the evaluation report.¹⁵⁸ Non-compliance with recommendations may trigger a special procedure aimed at reinforcing peer pressure to force a member country to comply with recommendations and may lead to issuing a public statement by the Statutory Committee of GRECO.¹⁵⁹

GRECO constitutes the most comprehensive evaluation process at the pan-European level. According to the OSI, ‘...the GRECO reports remain the nearest thing in existence to analysis based on consistent standards, producing evaluations that can be used on a comparative basis, at least in the area of anti-corruption policy.’¹⁶⁰ It has also been observed that GRECO activities have raised awareness of the problems faced by the authorities in the fight against corruption and ‘national governments have been forced to reconsider their legislation and improve their administrative practices.’¹⁶¹

¹⁵⁵ Rule 22(2) of GRECO Rules of Procedure, Council of Europe, GRECO(2005) 6E
<[http://www.coe.int/t/dg1/greco/documents/2005/Greco\(2005\)6_EN.pdf](http://www.coe.int/t/dg1/greco/documents/2005/Greco(2005)6_EN.pdf)> last accessed 25 November 2007.

¹⁵⁶ Rule 23 of GRECO Rules of Procedure. GRECO’s first evaluation round (2000–2002) dealt with the independence, specialisation and means of national bodies engaged in the prevention and fight against corruption. It also dealt with the extent and scope of immunities of public officials from arrest, prosecution, etc. The second evaluation round (2003–2006) focused on the identification, seizure and confiscation of corruption proceeds, the prevention and detection of corruption in public administration and the prevention of legal persons (corporations, etc) from being used as shields for corruption. The third evaluation round (launched in January 2007) addressed (a) the incriminations provided for in the Criminal Law Convention on Corruption and (b) the transparency of party funding
<http://www.coe.int/t/dg1/greco/evaluations/index_en.asp> accessed 10 December 2007.

¹⁵⁷ Rule 24– 29 of GRECO Rules of Procedure.

¹⁵⁸ Rule 30 of GRECO Rules of Procedure.

¹⁵⁹ Article 32 and 33 of GRECO Rules of Procedure.

¹⁶⁰ OSI Report (n 29), at 65.

¹⁶¹ Polakiewicz (n 154), at 285.

At the global level, recently an evaluation mechanism has been established to monitor the implementation of the UNCAC. The Working Group on the Review of Implementation (UN WG) met for the first time in August 2007¹⁶², and the methodological options of review were still under discussion. In order to test the available methods of evaluation, the UN WG distributed to state parties a questionnaire on the implementation of the UNCAC. The text will be analysed by a group of experts, who may also conduct country visits to validate the findings of their analysis.¹⁶³ A final report on the findings of the pilot project will be presented to the Conference of State Parties in 2008.

In addition, it is important to mention two monitoring mechanisms in the area of money-laundering conducted by FATF and the MONEYVAL within the Council of Europe. The FATF evaluation is also based on peer review.¹⁶⁴ In the first stage, every member country provides information on the status of its implementation of the Forty Recommendations and Nine Special Recommendations¹⁶⁵ by responding each year to a standard questionnaire.¹⁶⁶ On the basis of this information, the FATF assesses the extent to which the Recommendations have been implemented by both individual countries and the group as a whole. In the second stage, a team of experts from other member governments visit the member country and meets with government officials and the private sector over a two week period.¹⁶⁷ The purpose of such mutual evaluation is to draw up a report assessing the extent to which the evaluated country has effectively

¹⁶² United Nations, 'Conference of State Parties to the United Nations Convention Against Corruption' (2007) CAC/COSP/WG.1/2007/1
<http://www.unodc.org/pdf/crime/convention_corruption/cosp/WGs/WG1/V0784020-e.pdf> accessed 10 December 2007.

¹⁶³ United Nations, 'Conference of State Parties to the United Nations Convention Against Corruption' (2007) CAC/COSP/WG.1/2007/2, at 8
<http://www.unodc.org/pdf/crime/convention_corruption/cosp/WGs/WG1/V0785985e.pdf> accessed 10 December 2007.

¹⁶⁴ FATF, 'Monitoring the Implementation of the Forty Recommendations' <http://www.fatf-gafi.org/document/60/0,2340,en_32250379_32236920_34039228_1_1_1_1,00.html> accessed 10 December 2007.

¹⁶⁵ FATF, 'Nine Special Recommendations on Terrorist Financing' (updated 2004)
<<http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf>> accessed 10 December 2007.

¹⁶⁶ FATF (n 164).

¹⁶⁷ Ibid.

implemented a system against money laundering and to highlight areas in which further progress may still be required. These reports are available to the public.¹⁶⁸

The strength of the FATF evaluation lies in its policy of reinforcing peer pressure on a member that does not comply with the anti-money laundering recommendations. Such a member country is first asked to deliver a progress report at a FATF plenary meeting. Subsequent measures include a letter from the FATF President or the dispatch of a high-level mission to the non-complying member country. Finally, the FATF may issue a statement calling on financial institutions to give special attention to business relations and transactions with persons, companies and financial institutions domiciled in the non-complying country or suspend the FATF membership of the country in question. The FATF Recommendations are not legally binding instruments and have a soft law nature. However, as Gilmore pointed out, 'in governmental circles in the major economies, the FATF experience with mutual evaluation has been widely perceived as a success.'¹⁶⁹

Given the limited membership of FATF, there was a need to include the non-members of FATF, in particular the CEE countries, into a separate monitoring system within the Council of Europe. The evaluation body, MONEYVAL, was established in 1997 and is based on the FATF model. Considering the scope of evaluations carried out by MONEYVAL, it can be concluded that it is a more ambitious body. In addition to the FATF Recommendations, the evaluation includes the UN, the Council of Europe and the EU anti-money laundering instruments. The MONEYVAL evaluation reports are also available to the public.¹⁷⁰ In 2007, the activities of MONEYVAL were positively assessed by the Secretary General of the Council of Europe Terry Davis, who argued

¹⁶⁸ FATF Reports <http://www.fatf-gafi.org/document/32/0,3343,en_32250379_32236982_35128416_1_1_1_1,00.html> accessed 10 December 2007.

¹⁶⁹ Gilmore (n 136), at 139.

¹⁷⁰ MONEYVAL Reports <http://www.coe.int/t/e/legal_affairs/legal_co-operation/combating_economic_crime/5_money_laundering/General_information/Evaluations%20%20MONEYVAL.asp#TopOfPage> accessed 10 December 2007.

that as a result of the evaluations ‘...conventions are being ratified; laws and procedures which match international standards are being put into place; financial intelligence units are being created where none existed to analyse suspicious activity reports from banks and other relevant institutions.’¹⁷¹

The above monitoring mechanisms have brought results.¹⁷² It is important to notice that although the OECD recommendations and the Twenty Guiding Principles are non-binding or ‘soft law’ instruments, the monitoring systems ensure compliance by national governments. The advantage of peer review is the fact that during the process, countries exchange not only information but also have an opportunity to learn from each other and exchange best practices. On-site visits may also stimulate a government’s action.¹⁷³ It has been pointed out that the ‘soft law’ nature of peer review is often better suited to encourage and enhance compliance than a traditional enforcement mechanism, as it can take into account a country’s policy objectives and look at its performance in a historical and political context.¹⁷⁴ An additional advantage is that the outcomes of reviews are available to the public. In this way, civic organisations and the press may scrutinise actions of national governments and increase the pressure to step up efforts against corruption. As will be seen in subsequent chapters, similar mechanisms based on mutual evaluation and peer review were introduced by the EU in certain areas of the police and judicial cooperation in criminal matters and also within the pre-accession policy.

Conclusion

There are two distinct definitions of corruption at the EU level. While the criminal law definition is limited to outlawing bribery, for the purposes of prevention, the EU accepts

¹⁷¹ T. Davis, Secretary General of the Council of Europe, Speech ‘MONEYVAL 10th Anniversary plenary meeting’ (Strasbourg, 3 December 2007)

<http://www.coe.int/t/dc/press/news/20071203_disc_sg_EN.asp?> accessed 10 December 2007.

¹⁷² Heimann and Dell (n 141), at 24-26.

¹⁷³ Gilmore (n 136), at 137.

¹⁷⁴ Pagani (n 147), at 12.

a very broad and inclusive definition of corruption as an 'abuse of power for private gain', which puts it in the mainstream of international organisations. Ideally, the EU should base its policy against corruption within Member States on this concept of corruption, as it allows a focus not only on criminal law repression, but also on the prevention of corrupt conduct. In practice, however, as will be seen in Chapters Two and Three, to a large extent the EU limits its strategy to the criminalisation of bribery.

The evidence presented in this chapter confirms that corruption in the CEE countries was widely perceived to constitute a serious problem. The damaging consequences of corruption in these countries were exacerbated by the scale of political and economic changes undertaken after the collapse of communism. Corruption has made the transition to democracy and a free market economy more difficult and has demanded an emergency response. The extent and complexity of the problem of corruption in the post-communist countries posed a particularly difficult challenge for the EU, which, as it will be illustrated in the next chapters, decided to assist and guide these countries in their anti-corruption efforts.

International organisations have each responded to corruption in accordance with their specific goals and mandate. Initially, a narrow approach was taken, and corruption was approached as an impediment to international trade and market access. Over time, however, international cooperation addressed corruption in a broader sense as a serious threat to economic growth and political stability.

From the outset, international agencies saw the need to focus not only on repression of corruption by means of criminal law, but also on prevention. The OECD, the Council of Europe and the UN have all included preventive measures in their anti-corruption strategies. These measures usually take the form of non-binding recommendations or non-obligatory provisions in the treaties. They all aim at enhancing transparency and integrity in both the public and private sectors.

International experience also demonstrates the utmost importance of having appropriate monitoring mechanisms to evaluate the implementation of anti-corruption instruments at the national level. In some countries, these mechanisms have substantially increased the effectiveness of otherwise non-binding recommendations. Following this success, these recommendations served as a model for the national anti-corruption strategies.

This chapter has provided a useful background for consideration of the EU strategy against corruption. In particular, the initiatives of the Council of Europe and the UNCAC will serve as a yardstick for an assessment of EU action in this area. The next chapter opens a discussion about the EU anti-corruption strategy by analysing to what extent the EU mandate allows it to address the problem of corruption within its Member States.

The scope of EU legal powers and development of the policy in the area of anti-corruption

Similar to other international organisations, the EU responded to the problem of corruption in the second half of the 1990s. It addressed corruption in its own characteristic way corresponding with its goals, its structure and, most importantly, its competences. This chapter provides a legal and historical context for the development of the EU policy, setting a useful background for a detailed discussion of the legislative and institutional framework against corruption in the next chapter.

The chapter first outlines what the EU can possibly do to prevent and fight corruption within the Member States and what are the legal and political constraints of EU action. The anti-corruption *acquis* is complex from a legal point of view. The competences in the area of anti-corruption are divided between Member States and the EU. In addition combating corruption is a cross-pillar area matter, regulated under both European Community (EC) and EU Treaties.¹

¹ Consolidated versions of the Treaty on European Union (EU Treaty) and of the Treaty Establishing the European Community (EC Treaty), OJ C 321 E/1, 29.12.2006.

The chapter starts with an analysis of the available legal bases under the EC Treaty (also known as the ‘first pillar’) and explains that the Community has very limited legal powers with regard to preventing and combating corruption within the Member States. Next, the chapter discusses the competences under Title VI of the EU Treaty regulating the police and judicial cooperation in criminal matters (also known as the ‘third pillar’) and argues that the action of the EU is restrained by political, rather than legal factors. The legislative and institutional framework under both Treaties would be substantially amended if the Treaty of Lisbon² entered into force. In October 2007 the European Council agreed the final text of the Treaty of Lisbon, which draws upon the earlier Constitutional Treaty³ rejected in the French and Dutch referendums in 2005. The Treaty of Lisbon was signed on 13 December 2007 by the Heads of State or Government of 27 Member States, but still needs to be ratified by all Member States in accordance with their constitutional requirements. This chapter elaborates on the added value of the amendments introduced by the Treaty of Lisbon in the area of anti-corruption.

Furthermore, the chapter examines the three phases in the development of EU policy against corruption within the Member States. The focus here is on the policy, as opposed to the actual legal instruments and obligations of the Member States in this area. These instruments and obligations are discussed in greater detail in Chapter Three.

1. The legal bases in the area of anti-corruption policy

Competence is a technical term meaning ‘the legal power to act.’⁴ In the area of anti-corruption it denotes the power to decide on a broad range of policies, which touch upon many highly sensitive areas, for example:

² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, CIG 14/07, 3.12.2007.

³ Draft Treaty Establishing a Constitution for Europe, OJ C 169, 18.7.2003.

⁴ J. Shaw, Lecture (University of Edinburgh, School of Law, October 2006).

- criminal law
- limiting immunity of public officials and elected representatives
- introducing transparency rules in public administration
- regulating system for recruitment of civil servants
- organisation of anti-corruption bodies
- rules on financing of political parties
- ensuring freedom of media
- guaranteeing independence of the judiciary and prosecution.

National governments are generally very reluctant to give up to the EU control over these policy areas. Power to regulate some of these matters may bring them political benefits at the national level when used against political opponents. Moreover, sometimes Member States may tolerate corruption if it serves their economic interests. For instance, a Member State may even tolerate administrative weakness in customs enforcement if it contributes to greater trade going through its ports.⁵ For these reasons, there is a tension between the interests of Member States to preserve traditional sovereign powers and those of the EU to acquire the necessary means to tackle corruption at the European level.

This section analyses how far the EU competences in the area of anti-corruption reach. It starts by drawing attention to several important aspects of the EU legal order. Firstly, the EU does not have a general competence to regulate this policy area. Unlike a sovereign state, it only has competence within the limited areas in which it has been given power.⁶ In other words, every EU action requires a legal basis in the EC or EU Treaty. In the absence of such legal basis, the action will be declared void by the Court of Justice in accordance with rules laid down in Article 230 EC.

⁵ C.M. Warner, 'Creating a Common Market for Fraud and Corruption in the European Union: An Institutional Accident, or a Deliberate Strategy' (2002) EUI Working Papers, RSC No. 2002/31, at 20-21.

⁶ Article 5 EC. For more, see: P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials* (3rd edn OUP, 2003), at 132.

A legal basis is a provision of the Treaty that allocates competences between the EU and Member States and prescribes which legal instrument and legislative process should be used. The choice of legal basis is an important factor in the success of a proposal. There is a key difference between adopting the legal measures on the basis of the EC or the EU Treaty. Adoption of legal instruments under the EC Treaty entails many advantages, such as increased efficiency and transparency of the legislative process, co-decision power of the EP, guaranteeing a 'European dimension' of the legislative proposal through the right of initiative of the Commission, favouring high standard achievements through qualified majority voting and monitoring of implementation by the Member States.⁷

Secondly, EU action under first and third pillars is limited by the principle of subsidiarity and proportionality as formulated in Article 5 EC, whereby the EU can take an action in a certain area only if the objectives of the proposed action cannot be sufficiently achieved by Member States in the framework of their national legal systems and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community or Union. In addition, the principle of proportionality requires that EU action must not go beyond what is strictly necessary to achieve the objectives of the EC and EU Treaties. According to the guidance given by the Protocol on the application of the principles of subsidiarity and proportionality⁸, EU action is justified where:

- the issue under consideration has transnational aspects
- actions by Member States alone or lack of EU action would conflict with the requirements of the Treaty
- action at EU level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

⁷ Commission (EC), 'Implementing The Hague Programme: the way forward' COM(2006) 331 final, 28.6.2006, at 14.

⁸ Protocol on the application of the principles of subsidiarity and proportionality added by the Treaty of Amsterdam, OJ C 340/105, 10.11.1997.

The principle of subsidiarity is important from the point of view of initiating legislation by the Commission. When making legislative proposal, the Commission should consult widely and clearly state reasons for concluding that the EU objective can better be achieved by the action at the EU level.⁹

The principle of subsidiarity can be seen from three perspectives: constitutional, legal and political. In the first view, subsidiarity plays an important part in the constitutional structure of the EU, as ‘... it is a declaration of the vision of Europe shared by the authors of the Treaty and enshrined in that document.’¹⁰ Its goal is to ensure that decisions are taken closer to the people and in this way the principle serves democracy and protects Member States from centralization of power by the EU.

From a second perspective, subsidiarity is also a legal principle. Its goal is to regulate whether the competence of the Community or Union is properly exercised. The Court of Justice has jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act.¹¹ To date, however, the Court of Justice has not struck down a measure on the basis of breach of subsidiarity.¹² According to Barber there are two main explanations for this failure to develop subsidiarity as a legal constraint on Community action.¹³ Firstly, subsidiarity is not suited to judicial enforcement, because it requires deciding over difficult technical and political issues, including assessment of social and economic effects of the act and the balance of regional and central power.¹⁴

⁹ Ibid, paras 4 and 9.

¹⁰ N. W. Barber, ‘The Limited Modesty of Subsidiarity’ (2005) *European Law Journal*, Vol. 11 No. 3, 308-325, at 308.

¹¹ Articles 230 EC and Article 35 (6) EU.

¹² For discussion on the justiciability of the principle of subsidiarity, see: Ch. Ritzer, M. Ruttloff and K. Linhart, ‘How to Sharpen a Dull Sword- The Principle of Subsidiarity and its Control’ (2006) *German Law Review*, Vol. 07 No. 09, 733-760; G. de Búrca, ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’ (1998) *Journal of Common Market Studies*, Vol. 36 No. 2, 217-235; F. Sander, ‘Subsidiarity infringements before the European Court of Justice: futile interference with politics or a substantial step towards EU federalism?’ (2006) *Columbia Journal of European Law*, Vol. 12, 517-571.

¹³ N. W. Barber, ‘Subsidiarity in the Draft Constitution’ (2005) *European Public Law*, Vol. 11, Issue 2, 197-205, at 198.

¹⁴ Ibid, at 199.

Secondly, the principle of subsidiarity ‘...runs against the spirit’ of the Court of Justice.¹⁵ There is an ethos of the Court of Justice as an engine of integration, often adjudicating in favour of Community action over action at the Member States level and therefore, it is hard to imagine that the Court of Justice finds it easy to be impartial between the Community and Member States levels.¹⁶

In a third and final view, subsidiarity can be viewed as a political principle, as its enforcement essentially must be in the hands of political institutions and the role of the courts in enforcing it is limited.¹⁷ As will be discussed below, the political character of the principle of subsidiary has been reinforced by the Treaty of Lisbon, which enables the political scrutiny of the principle by the national parliaments. National parliaments are well placed to resolve difficult political issues that subsidiarity touches upon, but also have a strong interest in making sure that subsidiarity is applied.

1.1. The EC Treaty

The fight against corruption is not mentioned as one of the objectives of the Community in Articles 2 and 3 EC. There are, however, legal bases available under the EC Treaty which can be used for the adoption of anti-corruption measures. Firstly, corruption is addressed in the framework of protection of the Community financial interest and the fight against fraud. The most important provision in this area is Article 280 EC (ex Article 209a EC, introduced by the Treaty of Maastricht), which concerns exclusively the protection of the financial interests of the European Communities (EC). Also, the Treaty of Amsterdam amended Article 280(4) EC to provide a legal basis for adoption of legislation using the co-decision procedure and qualified majority voting in the Council with a view to affording effective and equivalent protection of the EC

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ J. Peters, ‘National Parliaments and Subsidiarity: Think Twice’ (2005) *European Constitutional Law Review* 1, 68-72, at 70.

financial interests in the Member States.¹⁸ The competence of the Community to adopt the administrative measures on the basis of Article 280 EC is not subject to dispute.¹⁹

It has been in continuous dispute, however, whether the Community can prescribe criminal sanctions for behaviour violating Community law.²⁰ In the context of protection of financial interests, the subject of debate is Article 280(4) EC, which specifies that measures taken on the basis of Article 280 EC 'shall not concern the application of national criminal law or the national administration of justice'. Some authors claim that this provision precludes any Community competence in the area of criminal law for the protection of the financial interests.²¹ However, it has also been argued that this exception precludes Community measures only as regards criminal procedure and law enforcement, not substantive criminal law.²² The latter view has been supported by the Commission and endorsed by the EP, which recognised the competence of the Community to adopt all the provisions that do not relate to procedural criminal law or judicial cooperation.²³

¹⁸ Before amendments introduced by the Treaty of Amsterdam, the legal measures aimed at protection of the financial interests were adopted on the basis of Article 308 EC (ex Article 235 EC).

¹⁹ W. van Gerven, 'Constitutional Conditions for a Public Prosecutor's Office at the European level' (2000) *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8/3, 296-318, at 307.

²⁰ For example: M. Wasmeier and N. Thwaites, 'The "battle of the pillars": does the European Community have the power to approximate national criminal laws?' (2004) *European Law Review* 29, 613-634; G. Donà, 'Towards a European Judicial Area? A Corpus Juris Introducing Penal Provisions for the Purpose of the Protection of the Financial Interests of the European Union' (1998) *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 6/3, 282-297; P. A. Albrecht and S. Braum, 'Deficiencies in the Development of European Criminal Law' (1999) *European Law Journal*, Vol. 5 No. 3, 293-310; K. Ligeti, 'European Community Criminal Law' (1998) *Acta Juridica Hungarica*, 39, Nos 1-2, 55-91; H. Hugger, 'The European Community's Competence to Prescribe National Criminal Sanctions' (1995) *European Journal of Crime, Criminal Law and Criminal Justice* 3, 241-271; M. Delmas-Marty, 'The European Union and Penal law' (1998) *European Law Journal*, Vol. 4 No. 1, 87-115.

²¹ For example: G.J.M. Corstens, 'Criminal law in the First Pillar?' (2003) *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 11/1, 2003, 131-144, at 142-143; W. van Gerven (n 19), at 306-307; J. Spencer, 'Legal bases for the implementation' in M. Delmas-Marty and J.A.E. Vervaele (eds), *The implementation of the Corpus Juris in the Member States* (Vol. 1 Intersentia, Antwerp-Groningen-Oxford 2000), 380-382, at 380.

²² For example: S. Peers, *EU Justice and Home Affairs Law* (2nd edn OUP, 2006), at 397; K. Tiedemann, 'Legal bases for the implementation' in M. Delmas-Marty and J.A.E. Vervaele (n 21), 385-387, at 385.

²³ Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests' (the Draft Directive) COM(2001)272 final, 23.5.2001, at 6-7; European Parliament, 'Report on the proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Communities' financial interests

There is an agreement across the EU institutions that Article 280 EC needs to be instrumentalised with the use of criminal law. To this end the Council advocates adoption of legal instruments under the third pillar and the Commission considers the use of the first pillar instruments as the most appropriate. These conflicting views became visible when in 2001 the Commission proposed a Directive on the criminal law protection of the EC financial interests (Draft Directive)²⁴ based on Article 280(4) EC. The proposal was a response to the lack of ratifications of the relevant instruments in this area adopted under the third pillar, in particular the Convention on the protection of the EC financial interests (PIF Convention)²⁵ together with the First Protocol²⁶ and the Second Protocol²⁷ to the PIF Convention. The Draft Directive did not bring anything new with regard to content; it only encompassed the main aspects of the third pillar instruments and aimed at approximation of national criminal law in relation to the protection of the EU financial interests. According to the proposal, the Member States would be required to make the acts of fraud, corruption and money laundering punishable criminal offences.²⁸ The Draft Directive was not accepted by the Council. In fact, 14 delegations did not support the adoption of the proposal, stating that they did not favour the adoption of criminal law measures on the basis of Article 280(4) of the EC Treaty.²⁹

(COM(2001)272-C5-0225/2001-2001/0115(COD))' A5-0390/2001, 8.11.2001, at 41; European Parliament, 'Report on criminal proceedings relating to the protection of the Union's financial interests' A4-0082/98, 3.3.1998, at 11-12.

²⁴ Commission (n 23).

²⁵ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, (adopted 26 July 1995, entered into force 17 October 2002 among the 15 old Member States) (the PIF Convention) OJ C 316/57, 27.11.1995.

²⁶ Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, (adopted 27 September 1996, entered into force 17 October 2002 among the 15 old Member States) (the First Protocol) OJ C 313/10, 23/10/1996.

²⁷ Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests (adopted 19 June 1997, not entered into force) (the Second Protocol) OJ C 221/22, 19.07.1997.

²⁸ Article 7 of the Draft Directive.

²⁹ Council of the European Union, 'Draft Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests' 10596/03, 18.6.2003.

In 2003, the Court of Justice was asked to resolve the dispute between the Community and the Union over the competence in the area of criminal law. The Commission brought a legal challenge to annul the Framework Decision on the protection of the environment through criminal law arguing that it was within the Community's powers to adopt environmental legislation.³⁰ In Case C-176/03, the Court of Justice upheld the Commission's arguments and annulled the framework decision.³¹ The judgment confirmed the general rule that 'neither criminal law nor the rules of criminal procedure fall within the Community's competence',³² but recognised that this rule 'does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.'³³

The above judgement of the Court of Justice cast a significant new light, but also a continuing uncertainty. Case C-176/03 involved protection of the environment, which according to the Court of Justice constituted 'one of the *essential* objectives of the Community.'³⁴ (emphasis added) In the Communication on the implications of this judgement, the Commission expressed the view that criminal law measures could be adopted on a Community basis only at the sectoral level and only on condition that there was a clear need to 'combat serious shortcomings in the implementation of the Community's objectives and to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom.'³⁵ It remained unclear, however, whether the judgement of the Court of Justice extended to

³⁰ OJ C 135/21, 7.6.2003.

³¹ Case C-176/03 *Commission v Council* [2005] ECR I-7879.

³² *Ibid*, para 47.

³³ *Ibid*, para 48.

³⁴ *Ibid*, para 41.

³⁵ Commission (EC), 'Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgement of 13 September 2005 (Case 176/03 *Commission v Council*)' COM(2005)583 final/2, 24.11.2005, para 7.

areas other than protection of the environment and, in particular, whether the Community competence extended to the achievement of any Community objective.³⁶ This issue was further elaborated by the Court of Justice in the Case C-440/05 concerning a challenge by the Commission to the Council's framework decision aimed at harmonising criminal sanctions in relation to ship source pollution.³⁷ In the judgment to the Case C-440/05 the Court of Justice annulled the contested framework decision and confirmed that the main findings from the Case C-176/03 apply also in the area of transport policy (Article 80(2) EC).³⁸ Most importantly, however, the Court of Justice found that the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence.³⁹

What is the significance of these judgements for the area of anti-corruption? Considering the willingness of the Court of Justice to give the Community a competence to legislate in the area of criminal law, one can predict that the implications of the judgment extend to other Community policy areas. One can therefore argue that the Community has the competence to adopt criminal-law measures to ensure that the protection of the financial interests as prescribed by Article 280 EC is fully effective. If the above judgement applies to the area of the protection of the financial interests, then it needs to be recognised that Article 280 EC is a specific legal basis which, by virtue of Articles 29 and 47 EU Treaty, takes precedence when adopting measures regarding the protection of the EC financial interests. It should follow that the Commission's analysis claiming that the above mentioned Draft Directive on the criminal-law protection of the EC financial interests should be adopted on the basis of Article 280(4) EC is correct.⁴⁰ It must be emphasised, however, that the PIF Convention and its Protocols would not be entirely invalid, as apart from establishing criminal offences, they also regulate judicial

³⁶ For discussion, see: V. Mitsilegas, 'Constitutional Principles of the European Community and European Criminal Law' (2006) *European Journal of Law Reform*, Vol. VIII, no. 2/3, 301-323, at 302-309 and Peers (n 22), at 394-397.

³⁷ Case C-440/05 *Commission v. Council* [2007] (ECJ 23 October 2007).

³⁸ *Ibid*, para 66.

³⁹ *Ibid*, para 70.

⁴⁰ *Commission* (n 35), at 8.

cooperation among Member States, which does not fall under the Community competence.

The added value of the judgement would be the enhanced monitoring of implementation of these instruments by Member States. As Chapter Three will discuss in more detail, adoption of the legal instruments under the first pillar entails greater monitoring powers for the Commission, in particular infringement procedure under Article 226 EC. There is no similar enforcement action under the third pillar, and the EU Treaty provides for very limited monitoring mechanisms in the area of police and judicial cooperation in criminal matters. Lack of effective monitoring results and delays in ratification and implementation is one of the most serious weaknesses of the anti-corruption instruments adopted under the third pillar. In particular, as of 12 December 2007, the PIF Convention and the First Protocol have not yet been ratified by Bulgaria, Czech Republic, Hungary, Malta, Poland and Romania, and the Second Protocol still needs to be ratified by Bulgaria, the Czech Republic, Hungary, Malta, Poland, Romania and Italy.⁴¹

Member States, however, do not appear to support a wider interpretation of the Community competence. It is worth adding that in the Case C-176/03 the Council was supported by 11 out of 15 Member States and in the Case 440/05 by 19 out of 25 Member States. As a result, in 2006 the Member States agreed on a procedure to be followed within the Council when a Commission proposal involves measures relating to the criminal law, which ensures scrutiny of a proposal by the preparatory bodies within the Council at an early stage of negotiation.⁴²

Under the Treaty of Lisbon the first and third pillars are merged into a single legal framework, which foresees the same legal instruments for both pillars, including

⁴¹ For charts of ratifications, see: <<http://www.consilium.europa.eu>> accessed 12 December 2007.

⁴² Council of the European Union, 'Procedure for future handling of legislative files containing proposals relevant to the development of criminal law policy' 7876/06, 28.3.2006.

regulations, directives, decisions, recommendations and opinions.⁴³ The abolition of the EU pillar structure should remove the controversies over the appropriate legal basis. It is confirmed by the removal from Article 280(4) of the contested paragraph on the impact of Community measures on the application of national criminal law or the national administration of justice.

It should be emphasised, however, that the impact of the Treaty of Lisbon on the criminal law competence differs from the procedure resulting from the above judgements of the Court of Justice in two important ways. First, while the judgements of the Court of Justice entail monopoly of initiative by the Commission, the Treaty of Lisbon foresees that the measures in the area of judicial cooperation in criminal matters, including the approximation of the laws of the Member States, are to be adopted within the Council using qualified majority voting and on the initiative of the Commission or a quarter of the Member States.⁴⁴ According to Monar, this seems to be ‘a good compromise between, on the one hand, the preservation of a right of initiative of the member states... and, on the other, the need to prevent a proliferation of initiatives from individual member states which are all too often inspired by purely national interests.’⁴⁵ Second, under the Treaty of Lisbon there is a possibility to use a special procedure, known as the ‘emergency brake’, when a Member State considers that a draft legislative act ‘would affect fundamental aspects of its criminal justice system’ it can request the draft to be referred to the European Council and the legislative procedure will be temporarily suspended.⁴⁶ In case of disagreement, the Treaty of Lisbon gives a possibility for at least nine Member States to establish enhanced cooperation on the basis of the initial draft proposal.⁴⁷ As has been pointed out, this provision raises serious concerns, as it:

⁴³ Article 249(1) of the Treaty of Lisbon.

⁴⁴ Article 61 I of the Treaty of Lisbon.

⁴⁵ J. Monar, ‘Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the ‘Area of Freedom, Security and Justice’?’ (2005) *European Constitutional Law Review* 1, 226-246, at 242.

⁴⁶ Article 69B (3) of the Treaty of Lisbon.

⁴⁷ *Ibid.*

enables any of the member states simply to interrupt a legislative procedure through a referral to the European Council. This not only undermines the idea of a regular legislative process, but also gives to the European Council a *de facto* legislative role, which, according to the institutional system of the Union, it should not have.⁴⁸

It is important to emphasise that, even if the Community gains competence to protect the financial interests by means of criminal law as a result of the Court of Justice judgments, this would not have much impact on its general competence to prevent and fight corruption within the Member States, which would remain very limited. Again, the scope of measures adopted under Article 280 EC is confined to protection of the Community financial interests. This competence does not extend to the fight against corruption with no impact on the Community budget. The question is which legal bases allow the Community to address the problem of corruption beyond the protection of the EC financial interests. In this context, two residual provisions of the EC Treaty – Articles 95 and 308 EC – are discussed.

Article 95 EC Treaty confers on the Community the power to approximate national laws of Member States with the purpose of establishing and ensuring the proper functioning of the internal market. Corruption distorts fair competition and adversely affects the proper functioning of the internal market. Moreover, widespread corruption within the Member States is capable of undermining the effective implementation of the *acquis*. Under Article 95 EC corruption has been addressed through legislation concerning money laundering, terrorist financing, public procurement and the application of international accounting and auditing standards. The importance of these measures for preventing and combating corruption is discussed in more detail in Chapter Three. Here it is important to point out that the fight against corruption was not the primary objective of these measures, but they all aimed at ensuring the proper functioning of the internal market.

⁴⁸ Monar (n 45), at 241.

Could Article 95 EC, however, be used for the adoption of measures aimed at preventing and combating corruption within the Member States? On the basis of the case-law of the Court of Justice it is possible to elaborate on criteria which an anti-corruption measure would have to fulfil to be legitimately based on Article 95 EC. The Court of Justice established limits to the use of this Article. It recognised that the measures adopted under Article 95 EC must ‘genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.’⁴⁹ Therefore, for example, the adoption of the Directives against money laundering⁵⁰ and two Regulations against terrorist financing⁵¹ on the basis of Article 95 EC was justified because the introduction of the proceeds of illegal activities into the financial system and their further investment could damage the stability and reputation of the financial sector and thus threaten the internal market.⁵² The Court of Justice further ruled that a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result is not sufficient to justify the choice of Article 95 as a legal basis.⁵³ The measures adopted on the basis of Article 95 EC must have a primary objective of safeguarding the proper functioning of the single market, which is not merely incidental to other objectives.⁵⁴

Considering the above, it would be difficult to use Article 95 EC as a basis for adoption of measures which primarily aim at prevention and the fight against domestic

⁴⁹ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 84.

⁵⁰ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 28.06.1991 amended by OJ L 344/76, 28.12.2001 and Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309/15, 25.11.2005.

⁵¹ Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community, OJ L 309/9, 25.11.2005 and Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds, OJ L345, 8.12.2006.

⁵² For example: Regulation No 1889/2005, paras 2 and 3 and Directive 2005/60/EC, para 2.

⁵³ Case C-376/98 (n 49).

⁵⁴ Case C-317/04 *Parliament v. Council* [2005] ECR I-2457, Opinion of Advocate General Léger, paras 149 and 150.

corruption within Member States. The Commission, in its legislative proposal, would have to justify that the fight against corruption is only incidental to the primary objective of ensuring the proper functioning of the internal market. An example of an anti-corruption measure which could be based on Article 95, providing that the Community gains broader competence in criminal law, is the Framework Decision on combating corruption in the private sector.⁵⁵ The adoption of this Framework Decision was justified by the fact that corruption in the private sector distorts the proper functioning of the single market. It has been pointed out that, with the increase in cross-border trade in goods and services, corruption in the private sector is not just a domestic problem as it distorts competition in relation to the purchase of goods or commercial services and impedes sound economic development.⁵⁶ Moreover, one can argue that if the Community gains competence to prescribe the offences, criminalisation of cross-border corruption in the public sector could also be regulated under Article 95 EC. Bribery of public officials by private entities also distorts the proper functioning of the internal market and fair competition. As observed in Chapter One, the perception of cross-border corruption in the public sector as an impediment to trade was the reason behind adoption of the OECD Convention.

It would be more difficult, however, to fulfil the Court of Justice criteria in the case of a measure which would regulate purely domestic corruption without the cross-border dimension, such as corruption in the financing of political parties within the Member States. Although this measure would generally contribute to eliminating corruption across the EU and thus better functioning of the internal market, in the light of the case-law of the Court of Justice it would be hard to justify its adoption on the basis of Article 95 EC. In particular, the objective of combating corruption would be primary and the mere fact that corruption in the financing of political parties may affect the establishment or functioning of the internal market would not be sufficient to justify using that provision as the basis for the act.

⁵⁵ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, (the Framework Decision), OJ L 192/54, 31.7.2003.

⁵⁶ Ibid, paras 1 and 9.

Yet another possibility is the use of the residual Article 308 EC. This legal basis can be used if action by the Community is necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, if the EC Treaty has not provided the necessary powers. This Article, however, does not constitute a suitable legal basis for adoption of anti-corruption measures because the fight against corruption within the Member States is not a Community objective. However, combating corruption is an important element of maintaining and developing an area of freedom, security and justice which was recognised by the Treaty of Amsterdam as one of the objectives of the Union.⁵⁷ It is, therefore, argued that appropriate legal bases for adoption of measures against corruption within the Member States lie under the EU Treaty rather than EC Treaty.

1.2. The EU Treaty

Under the provisions of the third pillar, which deals with police and judicial cooperation in criminal matters, corruption is addressed as part of the general policy against organised and cross-border crime. The EU gained a competence to act in the area of anti-corruption with the entry into force of the Treaty of Maastricht⁵⁸ in 1993. Since then, the fight against corruption at the EU level has been taken beyond the protection of the EC financial interests.

Although the Treaty of Maastricht did not mention corruption expressly, combating fraud on an international scale was recognised to be a matter of 'common interest' (Article K.1 (5)) in which Member States agreed to cooperate. To that end the Council could unanimously adopt joint positions, joint actions and conventions.⁵⁹ The legal effect of joint actions and joint positions has been subject to debate⁶⁰, as the EU

⁵⁷ Article 2 EU in conjunction with Article 29 EU.

⁵⁸ OJ C 191, 29.7.1992.

⁵⁹ Article K.4 (3) and K.3 (2) of the Treaty of Maastricht.

⁶⁰ Peers (n 22), at 16-17.

Treaty was silent on that. For some joint positions, the legal effect was determined by their text, which, for example, could provide that joint position bound only the executive, not legislative or judicial authorities of Member States.⁶¹ Meanwhile, joint actions required Member States 'to present proposals to their national parliaments, rather than impose an obligation upon the entire State to ensure that the national law was amended.'⁶²

Conventions, on the other hand, are established instruments of public international law. They are binding on Member States once ratified and their legal effects are determined by national law. The Council, however, could merely recommend to the Member States the ratification of conventions in accordance with their respective constitutional requirements, and therefore the EU was dependent on the political will of the Member States to progress towards implementation.

The lack of effectiveness of the instruments introduced by the Treaty of Maastricht is particularly visible in the field of anti-corruption. The Joint Action on corruption in the private sector (the Joint Action)⁶³ adopted in 1998 was not implemented by all Member States and eventually had to be replaced by a new type of instrument, a framework decision, introduced by the Treaty of Amsterdam. The conventions did not constitute appropriate instruments for addressing the problem of corruption at the EU level either. The two main reasons were the lack of ratifications and minimal regulation. In 1999 Transparency International emphasised that the lack of ratification and implementation of the instruments was the major weakness of the EU anti-corruption policy.⁶⁴ Despite repeated calls for ratification from the Council, the EP

⁶¹ Council Joint Position 96/196/JHA of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, OJ L 63, 13.3.1996.

⁶² Peers (n 22), at 382-383.

⁶³ Council Joint Action 98/742/JHA of 22 December 1998 on corruption in the private sector, OJ L 358/2, 31.12.1998.

⁶⁴ Transparency International, 'Fighting Corruption: What remains to be done at the EU level' (1999) Working Paper.

and the Commission⁶⁵, the anti-corruption instruments in the form of conventions and protocols were not promptly ratified by all Member States.⁶⁶ For example, the PIF Convention adopted in 1995 and the First Protocol adopted in 1996 came into force only on 17 October 2002 and the Second Protocol adopted in 1997 has not yet entered into force. Similarly, the Convention against bribery of Member States' and Community officials (the Anti-Corruption Convention)⁶⁷, adopted in 1997, entered into force only eight years later on 28 September 2005.⁶⁸ Such delays show how ineffective the third pillar instruments are and seriously undermine the political credibility of Member States with regard to any future anti-corruption initiatives.

The conventions represent yet another serious weakness. Since they are adopted under the rules of unanimity, they are an outcome of a political compromise. Thus, they often do not regulate the matter in a comprehensive manner but rather tend to impose only minimum standards, resulting in the lowest common denominator that is acceptable to all Member States. The scope of these instruments is very narrow, and therefore the Member States are usually allowed to adopt internal provisions imposing more stringent obligations.⁶⁹ As Kuijper pointed out, 'a Member State proposal frequently was the product of a particular national orientation... and the only way to arrive at agreement

⁶⁵ For example: Commission (EC), 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy Against Corruption' COM(2003) 317 final, 28.5.2003, at 8; Amsterdam European Council, Presidency Conclusions (16 June 1997); European Parliament, 'Report on the Communication from the Commission to the Council and the European Parliament on a Union policy against corruption', A4-0285/98, PE 226.841/fin., 24.7.1998, at 9-10.

⁶⁶ Commission (EC), 'Report from the Commission. Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols' COM(2004) 709 final, 25.10.2004.

⁶⁷ Convention drawn up on the basis of Article K.3 (2) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, (the Anti-Corruption Convention), OJ C 195, 25.06.1997.

⁶⁸ As of 13 December 2007, it has not been ratified by Czech Republic and Malta
<<http://www.consilium.europa.eu>> last accessed 13 December 2007.

⁶⁹ Article 11 of the Anti-Corruption Convention and joint reading of Article 7 of the First Protocol and Article 9 of the PIF Convention.

among all the Member States was to strip it down to a minimal product acceptable to all.⁷⁰

The effectiveness of the fight against corruption has been enhanced since the entry into force of the Treaty of Amsterdam, in which the fight against corruption was expressly recognised as one of the objectives of the Union.⁷¹ Article 29 EU recognised preventing and combating corruption as an important element in the area of freedom, security and justice. In order to fight corruption, Member States agreed for closer police and judicial cooperation in criminal matters and approximation of national criminal laws.

The highly ineffective instruments in this field were replaced by legal instruments introduced by Article 34(2) of the Treaty of Amsterdam, including common positions, framework decisions and decisions. Common positions define the approach of the EU to a particular matter, such as the Council's Common Position on the UNCAC⁷² adopted on the basis of Article 34(2)(a) EU. Meanwhile, there are two substantial differences between framework decisions and decisions. First, framework decisions are binding as to the result to be achieved and leave to the national authorities the choice of form and methods, while decisions are binding in their entirety.⁷³ Second, while framework decisions can be adopted for the purpose of approximation of the laws and regulations of the Member States, decisions can be adopted for any other purpose consistent with the objective of police and judicial cooperation in criminal matters, excluding, however, approximation of the laws and regulations of the Member States.⁷⁴ Neither decisions nor framework decisions entail direct effect.

⁷⁰ P.J. Kuijper, 'The Evolution of the third pillar from Maastricht to the European Constitution: Institutional Aspects' (2004) *Common Market Law Review* 41 Issue 2, 609-626, at 611.

⁷¹ Article 2 EU read in conjunction with Article 29 EU.

⁷² Council of the European Union, 8897/4/02, 30 October 2003.

⁷³ Article 34 (2) (b) and (c) EU.

⁷⁴ *Ibid.*

Although the EU Treaty upholds the possibility to adopt conventions⁷⁵, since the entry into force of the Treaty of Amsterdam the Council has not used the convention and has instead relied 'exclusively on framework decisions and decisions to regulate what traditionally could be regulated only by means of a "convention"'.⁷⁶ The possibility to adopt framework decisions by the Council substantially increased the influence of the EU on the criminal laws of Member States. There are two important aspects of framework decisions, which make them more effective than conventions: the deadline for implementation and the monitoring mechanism. Unlike conventions, which become binding upon ratification by Member States, framework decisions do not need to be approved or ratified at the national level, although they require implementation and introduce changes into national law. The Member States must implement them within a prescribed period of time, which in case of the Framework Decision on corruption in the private sector was within two years after adoption.⁷⁷

The second important aspect of framework decisions is that the Council and the Commission have powers to monitor their effective implementation into national laws. Article 9(2) of the Framework Decision on combating corruption in the private sector obliges the Member States to transmit to the Council and the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. Following that, the Council assesses the extent to which Member States have complied with the provisions of this Framework Decision. Moreover, the Court of Justice in the *Pupino* case⁷⁸ has confirmed that although EU framework decisions do not have a direct effect, i.e. they cannot be directly invoked by individuals in national courts, they have an indirect effect. This means that national courts must

⁷⁵ Treaty of Amsterdam simplified the procedure for the entry into force of conventions, i.e. according to Article 34(d) EU 'unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States'. This represents an improvement compared to the Treaty of Maastricht, which contained no such provision, but still, there is no obligation to adopt conventions within a set period of time.

⁷⁶ G. Vermeulen, 'Where do we currently stand with harmonisation in Europe?' in A. Klip and H. van der Wilt (eds) *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Arts and Science, Amsterdam 2002), 65-76, at 70.

⁷⁷ Article 9 of the Framework Decision.

⁷⁸ Case C-105/03 *Pupino* [2005] ECR I-5285.

interpret national law in the light of framework decisions. The Court of Justice also confirmed that, similarly to Directives in the first pillar, unimplemented framework decisions cannot impose criminal liability upon individuals or aggravate such liability.⁷⁹

Similar to framework decisions, decisions also do not need to be approved or ratified at the national level, even though they require implementation and may introduce changes into national law. One of the examples in the area of anti-corruption is the proposal for a Council Decision on the setting anti-corruption network⁸⁰, which will be discussed in a more detail in Chapter Seven.

The Treaty gives the EU the legal powers to address cross-border corruption and approximate criminal provisions of the national anti-corruption laws. The approximation is however limited to agreeing on minimum common rules relating to the constituent elements of criminal acts and penalties, leaving Member States free to adopt more stringent measures.⁸¹ This corresponds to the general Community approach to approximation of national laws within the internal market⁸², and it enables Member States to maintain more stringent standards, provided that these are compatible with the Treaty.

Approximation in the area of anti-corruption was not a new concept introduced by the Treaty of Amsterdam. Efforts to approximate criminal law in this area began after the entry into force of the Treaty of Maastricht in 1993. Although the provisions of the Treaty did not explicitly grant the Council a competence to harmonise the substantive criminal laws of Member States, Peers has pointed out that Article K.1 (5) referred to combating fraud on an international scale in so far as this was not covered by judicial, customs and police cooperation in criminal matters, 'thus implying that there was

⁷⁹ Ibid, paras 44 and 45.

⁸⁰ Council of the European Union, 'Initiative of the Republic of Germany with a view to the adoption of a Council Decision on a contact-point network against corruption' 11202/07, 25.6.2007.

⁸¹ Article 31(e) EU.

⁸² Craig and de Búrca (n 6), at 1195.

competence to harmonize substantive criminal law in these areas independently of judicial cooperation.⁸³ All the anti-corruption instruments adopted after the entry into force of the Treaty of Maastricht, including the First Protocol, the Anti-Corruption Convention and the Joint Action on corruption in the private sector aimed at harmonising the definition of corruption and the approximation of sanctions.

The political will to approximate with regard to the offence of corruption, was reiterated by the Vienna Action Plan⁸⁴, the Tampere European Council⁸⁵ and the EU Strategy for the Beginning of the New Millennium.⁸⁶ As a result, as already mentioned above, in 2003 the Council adopted a Framework Decision aimed at approximating the offence of corruption in the private sector, which replaced the earlier ineffective Joint Action. The need for a more effective instrument in this area had become particularly urgent due to adoption the Framework Decision on the European arrest warrant in 2002⁸⁷, which included corruption in the list of offences in respect of which prior verification of double criminality is not required. Given the substantial differences in the laws of the Member States, there was a need to harmonise the essential aspects of the offence and the penalties in the area of private sector corruption.⁸⁸

Corruption is also one of the areas where approximation of laws is specifically mentioned by the Treaty of Lisbon.⁸⁹ The approximation of substantive criminal laws is foreseen in cases of corruption with 'a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.'⁹⁰

⁸³ Peers (n 22), at 382.

⁸⁴ Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, OJ C 19/1, 23.1.1999, para 18.

⁸⁵ Tampere European Council, Presidency Conclusions, (16 October 1999), para 48.

⁸⁶ Council of the European Union, 'The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium' 6611/00, 3.3.2000, recommendation 7.

⁸⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002.

⁸⁸ European Parliament, 'Report on the initiative of the Kingdom of Denmark with a view to the adoption of a Council framework decision on combating corruption in the private sector ((10689/2002 – C5-0376/2002 – 2002/0817(CNS))' A5-0382/2002, 7.11.2002, at 15.

⁸⁹ Article 69B (1) of the Treaty of Lisbon.

⁹⁰ Ibid.

It is also restricted to the establishment of minimum rules concerning the definition of criminal offences and sanctions in this area.⁹¹ One can therefore conclude that the Treaty of Lisbon does not bring any substantial changes in this area.

Criminal law, however, is only one of the elements of the comprehensive anti-corruption strategy. Thus, the question arises whether the EU can do more than approximate the offence of corruption. The answer is yes. The EU has the political capacity and legal tools under the EU Treaty to develop a more comprehensive policy against corruption within the Member States. The EU competence in this area is not clear and does not directly stem from provisions of the EU Treaty. Nonetheless, it exists and depends on the political will of the Member States and, in particular, on how they interpret the need to fight cross-border corruption and organised crime.

In accordance with Article 29 EU an objective of the Union is to provide citizens with a high level of safety within an area of freedom, security and justice by preventing and combating crime. This article gives the EU a clear competence to fight cross-border corruption and organised crime. The amendments introduced by the Treaty of Lisbon do not change that. It is up to Member States to decide on the extent of necessary measures to fight these two forms of crimes. First, the focus on combating cross-border corruption cannot be separated from broader policy of fighting corruption within the countries. An important point has been made by Johnston, who has argued that 'efforts to control cross-border corruption will meet with little success unless they are supported by, and co-ordinated with, effective action against domestic abuses.'⁹² As in the case of domestic corruption, 'weak and poorly run institutions increase vulnerability to cross-border corruption', therefore a country with high levels of internal corruption is likely to have problems with cross-border corruption.⁹³

⁹¹ Ibid.

⁹² M. Johnston, 'Cross-Border Corruption: Points of Vulnerability and Challenges for Reform' (1997) UNDP-PACT and OECD Development Centre Workshop on Corruption, at 14 http://www.undp.org/governance/contactcdrom-contents/CONTACT_doc/Corruption_report/Chapter01.pdf> accessed 14 December 2007.

⁹³ Ibid, at 17.

Second, as far as the fight against organised crime is concerned, Member States are free to recognise that coordination of national anti-corruption policies is an important element of that fight. Corruption has already been addressed by the EU in the context of organised crime, and some positive policy developments in this area were initiated in 2004 by a five-year programme for EU action in the area of JHA, the so-called Hague Programme⁹⁴, which is discussed in more detail in Chapter Seven.

In both cases the EU Treaty provides the necessary legal tools to set common anti-corruption standards among its Member States. The EU could use decisions, a legal instrument introduced by the Treaty of Amsterdam. In fact, as mentioned above, the Member States made a proposal for a Decision on setting anti-corruption network, which will be discussed in a more detail in Chapter Seven. Here, it suffices to say that it is up to the Member States to decide on how far-reaching and effective this proposal eventually goes and they can decide to establish a network that would be responsible for monitoring national policies in this area. There is also a possibility to use 'soft law' measures, such as the Council's Resolutions, Recommendations and Conclusions to discipline the Member States with regard to their anti-corruption efforts. With such options available, it is clear that EU action under the third pillar is limited more by political than legal factors.

It is also important to point out that the Treaty of Lisbon provides some provisions which may enhance the Union competence in the area of anti-corruption. That particularly applies to a provision that provides that the Union may support the efforts of Member States to improve their administrative capacity to implement *acquis*.⁹⁵ In addition, the Treaty of Lisbon provides that the Union may establish measures to promote and support the action of Member States in the field of crime prevention.⁹⁶

⁹⁴ Council of the European Union, 'The Hague Programme: strengthening freedom, security and justice in the European Union' 16054/04, 13.12.2004.

⁹⁵ Article 176D of the Treaty of Lisbon.

⁹⁶ Article 69C of the Treaty of Lisbon.

The intergovernmental nature of cooperation under the EU Treaty makes any progress in the area of combating corruption dependent on the political will of the Member States. The Commission has a right of legislative initiative under the third pillar, but every such initiative must comply with the principle of subsidiarity in accordance with Article 2 EU. In the area of anti-corruption, the action of the EU is justified in cases of cross-border corruption falling outside the single jurisdiction of a Member State. However, if the EU was to address the problem of domestic corruption within the Member States, the question would arise as to whether the EU is the most appropriate level to deal with this field of national policy. It would be hard to justify action in areas without clear cross-border impact. For example, it would be hard to justify why the laws on the financing of political parties within Member States should be adopted at the EU level, considering differences in legal systems and traditions among Member States in this area. In the third pillar, however, the principle of subsidiarity is politically monitored by Member States. Due to unanimous decision making, any Member State can simply dismiss the proposal if it appears to violate the principle of subsidiarity.

If the Treaty of Lisbon entered into force, the subsidiarity may be more intensely scrutinized and invoked before the Court of Justice. Due to the qualified decision making in the Council, which was provided for in the Treaty of Lisbon, the Member States may be more likely to challenge a measure on the grounds that it breaches the principle of subsidiarity, especially when they are outvoted in the adoption of a measure. In addition, the Protocol on the application of principles of subsidiarity and proportionality⁹⁷ attached to the Treaty of Lisbon introduces the possibility for a national parliament to challenge a perceived infringement of the principle of subsidiarity in the Court of Justice.⁹⁸ This means that the national parliaments will have a right to disagree with their Member State's government and object to a legislative act.

⁹⁷ Treaty of Lisbon (n 2).

⁹⁸ Article 8 of the Protocol.

The most serious drawback of the EU legal framework is the democratic deficit in the decision-making process within the third pillar, leading to questions about the suitability of the legal instruments available under the EU Treaty to decide on the content of national anti-corruption policies. The decision making within the third pillar is characterised by a lack of sufficient democratic legitimacy particularly in regard to parliamentary and judicial scrutiny of the adopted decision. Judicial and parliamentary control of measures in the area of judicial and police cooperation in criminal matters is particularly important, because it entails many potential implications for the rights of individuals. However, the EP is not sufficiently involved in the decision-making processes and has a merely consultative role in the legislative procedure.⁹⁹ The opinions of the EP are not binding and in practice the Council often does not accept its amendments because the requirement of unanimity in decision making means that delegations are unlikely to change anything due to an EP proposal.¹⁰⁰

The Court of Justice's competences in the third pillar also remain much more restricted than in the first pillar. The Treaty of Amsterdam increased the role of the Court of Justice by introducing the preliminary ruling procedure in Article 35 EU on the validity and interpretation of framework decisions and decisions, as well as on the interpretation of conventions and on the validity and interpretation of the measures implementing them. Moreover, in Case C-354/04 the Court of Justice confirmed that a national court may ask the Court to give a preliminary ruling concerning the validity or interpretation of a common position, when it has serious doubt whether that common position is really intended to produce legal effects in relation to third parties.¹⁰¹ However, the employment of preliminary rulings under the third pillar is not compulsory and depends on the declaration of the Member States.¹⁰² The Court of Justice also has

⁹⁹ Article 39 EU.

¹⁰⁰ H. Nilsson, 'Decision-Making in EU Justice and Home Affairs: Current Shortcomings and Reform Possibilities' (2002) SEI Working Paper No. 57, at 6.

¹⁰¹ Case C-354/04 *Gestoras Pro Amnistía and others v Council* [2007] ECR I-01657, para 54.

¹⁰² Article 35 (2) EU.

jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission.¹⁰³ Unlike in the case of legal measures adopted under the EC Treaty, natural or legal persons are not able to challenge the legality of measures adopted under the third pillar.¹⁰⁴

The decision making under the third pillar gives too much power to the executive. The decisions within the Council are adopted by ministers without the involvement of national parliaments, yet as pointed out above, the Treaty of Amsterdam substantially increased the influence of the EU on national criminal laws. Framework decisions and decisions are binding on the Member States, including national parliaments, yet they are considered to be established in a largely undemocratic and non-transparent way.¹⁰⁵ This goes against the principle of legality, according to which the legislative body gives democratic legitimacy to criminal law.¹⁰⁶

It remains open for the Member States to decide on the degree of national parliamentary scrutiny or control of the executive, and different national parliamentary procedures have resulted in delays in decision making under the third pillar.¹⁰⁷ As Kiiver pointed out, the first impression is that:

...national executives play European legislators under complex and secretive bargaining rules, and their parliaments at home have to accept, possibly implement into national law, binding Union legislation; they are too slow, too uninformed, and often too bored to enforce government accountability for European affairs; parliaments are ignorant of what their governments intend to do in the Council beforehand, and merely watch as the governments scapegoat 'Brussels' for unpopular decisions afterwards.¹⁰⁸

¹⁰³ Article 35 (6) EU. In addition, in Case C-354/04 (n 102), para 55, the Court of Justice ruled that it would be possible to review legality of common positions if they are intended to produce legal effects in relation to third parties.

¹⁰⁴ Article 35(6) EU, compare with Article 230 EC.

¹⁰⁵ Vermeulen (n 76), at 66

¹⁰⁶ A. Weyembergh, 'Approximation of criminal laws, the constitutional treaty and the Hague programme' (2005) *Common Market Law Review* 42: 1567-1597, at 1594.

¹⁰⁷ Peers (n 22), at 52 and Nilsson (n 100), at 6-7.

¹⁰⁸ P. Kiiver, 'The Composite Case for National Parliaments in the European Union: Who Profits from Enhanced Involvement?' (2006) *European Constitutional Law Review*, 2, 227-252, at 229. The author admits that this is a very simplistic and often not entirely correct first impression.

One of the most important objectives of the EU institutional reform was to enhance the democratic legitimacy within the EU decision-making process. The Constitutional Treaty introduced several far-reaching changes to the functioning of the third pillar, which were upheld by the Treaty of Lisbon. As already discussed above, the Treaty of Lisbon abolishes the pillar structure of the EU. Crucially, however, the Treaty of Lisbon foresees full jurisdiction of the Court of Justice over measures in the area of judicial and police cooperation. The standard legislative procedure will be a co-decision procedure involving qualified majority voting in the Council. Thus, the EP becomes a co-legislator in the further development of the area of freedom, security and justice.

The Treaty of Lisbon also facilitates greater participation of national parliaments in the EU decision-making process. The involvement of national parliaments is not new. The national parliaments have a right to receive information on European issues from their government and set up committees to scrutinise European documents and decisions.¹⁰⁹ The national parliament can also bind the government to a specific negotiation position.¹¹⁰ However, the scrutiny procedures differ across Member States¹¹¹ and the Treaty of Lisbon aims to ensure more systematic and enhanced involvement of national parliaments in decision making under the third pillar. Under the Protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Lisbon, the Commission is obliged to forward all legislative proposals to national parliaments at the same time as it forwards them to the Council and the EP.¹¹² They then have eight weeks to examine draft legislative texts and to give a reasoned opinion on subsidiarity.¹¹³ If national parliaments contest a draft legislative act, the Commission must re-examine the draft and may decide to maintain, amend or withdraw it.¹¹⁴ The

¹⁰⁹ K. Auel, 'Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs' (2007) *European Law Journal*, Vol. 13 No. 4, 487-504, at 488-489.

¹¹⁰ *Ibid.*, at 498-503.

¹¹¹ Nilsson (n 100), at 6-7.

¹¹² Article 4 of the Protocol.

¹¹³ Article 6 of the Protocol.

¹¹⁴ Article 7(2) of the Protocol.

Treaty of Lisbon provides a procedure in case the Commission chooses to maintain the draft, which may lead, depending on the EP and Council's opinion, to the withdrawal of the Commission's proposal.¹¹⁵

In addition, the Treaty of Lisbon specifically mentions the role of national parliaments in ensuring compliance of legislative initiatives in the areas of police and judicial cooperation in criminal matters in accordance with arrangements provided for by the Protocol on the application of the principles of subsidiarity and proportionality.¹¹⁶ Monar observed that 'although this controlling role of national parliaments applies in principle to all legislative initiatives, the specific mentioning of it in respect of the justice and home affairs area could increase the justification pressure for new measures, especially on the European Commission.'¹¹⁷ Further adding to their role, national parliaments will also take part in the evaluation mechanisms for the implementation of the Union policies in the area of freedom, security and justice and will be involved in the evaluation of the activities of Europol and Eurojust.¹¹⁸

There is a disagreement over how effective the Treaty of Lisbon would be in enhancing the democratic legitimacy within the EU decision-making process. Thym suggested that the enhanced role of national parliaments compliments the role of the EP and both levels of parliamentary accountability mutually reinforce democratic legitimacy at the EU level¹¹⁹, while Carrera and Geyer argue that the Treaty of Lisbon will respond to the democratic shortcomings that have so far characterised cooperation in the area of justice and home affairs.¹²⁰ However, Weyembergh suggests that an

¹¹⁵ Article 7(3) of the Protocol.

¹¹⁶ Article 61B of the Treaty of Lisbon.

¹¹⁷ J. Monar (n 45), at 232.

¹¹⁸ Article 8C (c) of the Treaty of Lisbon.

¹¹⁹ D. Thym, 'The Area of Freedom, Security and Justice in the Treaty establishing a Constitution for Europe' (2004) WHI Paper 12/04, at 8 <<http://www.rewi.hu-berlin.de/WHI/papers/whipapers404/paper0404.pdf>> accessed 14 December 2007.

¹²⁰ S. Carrera and F. Geyer, 'The Reform Treaty and Justice and Home Affairs. Implications for the common Area of Freedom, Security and Justice' (2007) CEPS Policy Brief. No. 141, at 2 <http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf> accessed 14 December 2007.

enhanced role for national parliaments does not necessarily lead to true democratisation, pointing out that high abstention rates in European elections may be interpreted as meaning that European citizens are disinterested with regard to EU matters, leading to a lack of interest by most national parliaments in the building of the EU criminal area.¹²¹ As Kiiver has pointed out, national parliaments could play a greater role even without large-scale constitutional reforms, if they only allocated more will, time and resources to European affairs.¹²²

2. The development of the EU policy against corruption

Combating corruption was not always high on the EU agenda. The EU, as well as others in the international community, started to address corruption in the second half of the 1990s. Attention focused on the EU policy against corruption within the Member States as well as the policy against internal corruption. It is, however, of utmost importance for the EU to have a genuine and coherent strategy against internal corruption, as widespread corruption within the EU institutions puts at risk the credibility of all EU policies and destroys citizens' confidence in the process of European integration. Moreover, the EU cannot legitimately demand high standards from candidate countries or the Member States if it does not hold its own administration to the same standards. As suggested by the EP, 'the Commission would be well advised to be seen to be putting its own house in order before giving lessons to others.'¹²³

As explicitly admitted by the Commission, it was the crisis triggered by the Santer Commission's resignation in March 1999 under allegations of fraud, corruption and nepotism that revealed the necessity to set up more effective measures for the protection of the integrity of the European Public Administration.¹²⁴ Two reports of the Committee of Independent Experts, convened in 1999 under auspices of the EP and the

¹²¹ Weyembergh (n 106), at 1596.

¹²² Kiiver (n 108), at 241.

¹²³ European Parliament (n 65), at 28.

¹²⁴ Commission (n 65), at 13.

Commission, exposed the inadequacy of the legal and institutional framework for the fight against corruption within the EU institutions.¹²⁵ In fact, the creation of a Committee of Independent Experts in itself meant that control authorities within the EU lacked both appropriate expertise and independence.¹²⁶

The late response to the problem of internal corruption is surprising, as this is the area where the Community competence is not subject to dispute. With regard to its administration, the Community has an exclusive competence to develop preventive anti-corruption policies, establish an anti-corruption body, implement Staff Regulation, promote transparency in decision making and avoidance of conflict of interests, and develop codes of conduct.¹²⁷ The fight against corruption within the institutions is regulated by the Community, particularly through administrative law provisions. The Commission can regulate this area with the use of internal decisions or on the basis of Article 280 EC under which, as discussed above, the Community has legal power to take action in order to protect the EC financial interests.

The only exceptions are the criminal law instruments addressing fraud and corruption of officials of the Community adopted under the EU Treaty. As a result, in addition to the criminal liability for corruption, an official may also face administrative liability and disciplinary sanctions under the Staff Regulation¹²⁸, which focuses on the preventive aspect of the strategy against corruption and defines ethical standards for officials of the Community. These standards include the duty to act impartially¹²⁹, the

¹²⁵ Committee of Independent Experts Reports, 'Second Report on Reform of the Commission: Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud' (Vol. 1 10 September 1999)

<http://ec.europa.eu/anti_fraud/reports/sages_en.html> accessed 14 December 2007.

¹²⁶ Ch. Lequesne and P. Rivaud, 'The Committees of Independent Experts: expertise in the service of democracy?' (2003) *Journal of European Public Policy* 10:5, 695-709, at 701.

¹²⁷ Commission (EC), 'Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the United Nations Convention Against Corruption' COM(2006) 82 final, 2.3.2006, Annex II.

¹²⁸ Staff Regulations of Officials of the European Communities, 1.5.2004.

<http://ec.europa.eu/civil_service/docs/toc100_en.pdf> accessed 14 December 2007.

¹²⁹ Article 11 (96) of the Staff Regulation.

prohibition of acceptance of any honour, decoration, favour, gift or payment of any kind from any source outside the institution to which an official belongs¹³⁰, and prohibition of an official performing his duties when any personal interest may impair his independence.¹³¹

The central body with the specific task to detect and combat corruption damaging the EC financial interests is the European Anti-Fraud Office (OLAF)¹³², established in 1999 in the wake of the resignation of the Santer Commission.¹³³ OLAF is an independent administrative body entrusted with powers to investigate cases of corruption, fraud and other illegal activity affecting the Community budget. It is competent to conduct two categories of investigations: internal and external.¹³⁴ Internal investigations are conducted by OLAF within the Community institutions, bodies, offices and agencies.¹³⁵ For example, at the end of 2004, OLAF opened 68 internal anti-corruption investigations and 25 cases were under assessment within the EU institutions.¹³⁶ External investigations involve OLAF's intervention in the Member States and are governed by formal Community legislation.¹³⁷ OLAF has a right to initiate inquiries as well as the right to decide, in cases where it has been responsible for an investigation, when files should be submitted to the judicial authorities for further investigation involving police powers and possible prosecution.¹³⁸

¹³⁰ Ibid.

¹³¹ Article 11a (96) of the Staff Regulation.

¹³² OLAF is a French acronym for 'Office Européen de la Lutte Anti-Fraude'.

¹³³ Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), OJ L 136/20, 31.5.1999.

¹³⁴ Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 136/1, 31.5. 1999 and Council Regulation (Euroatom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 136/8, 31.5. 1999.

¹³⁵ Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF), OJ L 136/1, 31.5.1999.

¹³⁶ OLAF, 'Report of the European Anti-Fraud Office' (2004), at 15.

¹³⁷ Council Regulation 2988/95 of 18 December 1995 on the protection of the European Communities' Financial Interests, OJ L 312/1, 23.12.1995; Council Regulation No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292/2, 15.11.96

¹³⁸ Articles 5 and 10 of the Regulation 1073/1999.

The highest standards of good administration and transparency at the European level are promoted in the activity of the European Court of Auditors and the European Ombudsman. The ECA is an independent external audit institution. In planning its audit programmes, the ECA takes account, *inter alia*, of the particular susceptibility to fraud and corruption which exists in many sectors. The European Ombudsman also plays a significant role in enhancing openness and transparency in the EU decision making. One of the European Ombudsman's most important initiatives in this field is the drafting of the European Code of Good Administrative Behaviour¹³⁹, which intends to explain the right to good administration, as guaranteed by the Charter of Fundamental Rights of the EU.¹⁴⁰

The European Ombudsman is also competent to investigate possible cases of maladministration in the activities of the Community institutions and bodies in accordance with Article 195 EC, which provides that any citizen of the EU or any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman cases concerning instances of maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. Maladministration is defined as occurring 'when a public body fails to act in accordance with a rule or principle which is binding upon it'¹⁴¹ and thus covers cases of corruption.

The resignation of the Santer Commission in 1999 was a turning point in the development of the administrative reform at the EU level. In 2000, the White Paper set out an overall strategy for the reform of the Commission based on principles of

¹³⁹ The European Code of Good Administrative Behaviour (2002)

<http://ombudsman.europa.eu/code/pdf/en/code2002_en.pdf> accessed 14 December 2007.

¹⁴⁰ Article 41 Charter of Fundamental Rights of the EU, OJ C 364/1, 18.12.2000.

¹⁴¹ The European Ombudsman, 'Annual Report For 1997' (1998), at 23

<http://www.euro-ombudsman.eu.int/report97/pdf/en/rap97_en.pdf> accessed 14 December 2007.

independence, responsibility, accountability, efficiency and transparency.¹⁴² The reforms included: (1) the creation of a new internal audit service, (2) improving public access to documents of the EP, the Council and the Commission, (3) revision of a career system and (4) 'fraud-proofing' of legislation.¹⁴³ The Commission also took a number of important initiatives to foster transparency and accountability at the EU level. It adopted a series of measures aimed at enhancing integrity among its staff, which included the adoption of codes of conduct for Commissioners¹⁴⁴ and Commission Staff¹⁴⁵ and a decision setting rules for the Commission staff on how to report serious wrongdoings.¹⁴⁶

The Commission also recognises that transparency is an important element of the prevention of fraud and corruption. The European Transparency Initiative launched in 2005 aims at identifying and stimulating a discussion on areas where transparency at the EU level needs to be improved.¹⁴⁷ Examples of areas where a need for a further action was identified include: (1) publication of data about beneficiaries of EU funds, (2) regulation of lobbying, (3) strengthening the ethics in the European institutions and (4) revising the regulation of access to documents at the EU level.¹⁴⁸

In its anti-corruption policy, the EU also relies on the work carried out by international agencies. The most important example from recent years is the process of the Community's accession to the UNCAC, which is discussed in more detail in Chapter Three. If the Community becomes a party to the UNCAC, it will be bound to apply high anti-corruption standards in its own strategy against internal corruption. This is evidence that the fight against corruption has become a relatively high priority for the EU, and there seems to be a political commitment to fight corruption within the EU

¹⁴² Commission (EC), 'Reforming the Commission: a White Paper', Part I COM(2000) 200 final/2, 5.4.2000.

¹⁴³ Ibid.

¹⁴⁴ Code of conduct for Commissioners, SEC(2004) 1487/2, 23.11.2004.

¹⁴⁵ Commission Decision, of 17 October 2000 amending its Rules of Procedure, OJ L 267/63, 20.10.2000.

¹⁴⁶ Commission (EC), C/2002/845 of 2 April 2002.

¹⁴⁷ Commission (EC), 'Green Paper. European Transparency Initiative', COM(2006) 194 final, 3.5.2006.

¹⁴⁸ For more, see: Transparency Initiative

<http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm#4> accessed 14 December 2007.

institutions.¹⁴⁹ As concluded by Transparency International, ‘...sufficient safeguards, controls, audit and anti-fraud mechanisms have now been put in place.’¹⁵⁰

As far as the policy against corruption within the Member States is concerned, one can distinguish three phases in its historical development. In the first phase, attention was focused on the protection of the EC financial interests and this turned out to be a platform for the further development of anti-corruption policy. To show how this platform developed, this section discusses the policy against fraud affecting the EC financial interests, but only to the extent that helps better to understand the developments in the area of anti-corruption. During the second phase, the EU began to approach the offence of corruption directly and adopted legal instruments that specifically addressed the offence of corruption both in the public and private sectors. Finally, the third phase started in 1997 with the agreement across the EU institutions on the need for a broad anti-corruption policy at the EU level. That year the Commission adopted the First Communication on the EU policy against corruption, which was the first EU policy document to focus on the subject. Together with the Second Communication adopted in 2003, both documents provide an outline of what can be seen as a comprehensive EU policy against corruption.

2.1. Phase One: The fight against corruption in the context of the protection of the Communities’ financial interests

The first anti-corruption instrument at the EU level was adopted in the context of the policy against fraud affecting the EC financial interests. Despite the great importance of anti-fraud policy for the legitimacy and credibility of the European integration project, it took the EU quite a long time to develop an adequate anti-fraud policy. As White has

¹⁴⁹ S. Kallas, ‘The European Union: An Elodorado of Corruption?’ (Speyer, Germany, 27 October 2006).

¹⁵⁰ Transparency International, ‘Comments on the European Commission Communication on “A Comprehensive EU Policy Against Corruption”’ (2003), at 3
<http://www.transparency.org/content/download/2017/12199/file/tibrussels_on_eu_commission.pdf>
accessed 14 December 2007.

pointed out, the approach to fraud control until the 1990s can be described as ‘atomistic’ or ‘fragmentary’.¹⁵¹ There was no general anti-fraud framework, only sector specific regulations mostly in respect of the Common Agriculture Policy, which consumed a large part of the Community budget.¹⁵²

Initially, the protection of the EC financial interests was not a priority for the EU. Nikodem observed that the lack of political will to develop effective means to combat fraud can be explained by the fact that, in the early stages of integration, the Community budget was dependent on Member States’ contributions, and thus the Member States ‘...carried the burden of negative financial consequences of fraud.’¹⁵³ The situation changed when the Community developed its own resource system in the 1970s.¹⁵⁴

In 1976 the Commission submitted a proposal for an amendment to the Treaty, which provided for the adoption of common rules for the criminal-law protection of financial interests and an equivalent protection for the financial interests of EC and Member States in accordance with the principle of assimilation.¹⁵⁵ This proposal was not, however, adopted by the Member States. Nonetheless, the principle of assimilation was introduced to the Community legal order in the 1980s by the Court of Justice. A principle whereby infringements affecting the Community budget had to be penalized under the same conditions as infringements affecting the national budget was articulated for the first time in the ‘*Greek maize*’¹⁵⁶ case and later codified in Article 209a EC of the Treaty of Maastricht. After amendments by the Treaty of Amsterdam, it is Article 280(2) EC: ‘Member States shall take the same measures to counter fraud affecting the EC

¹⁵¹ S. White, *Protection of the Financial Interests of the European Communities: The Fight Against Fraud and Corruption* (Kluwer Law International, 1998), at 17.

¹⁵² Ibid, 7-12.

¹⁵³ A. Nikodem, ‘The Evolution of Anti-Fraud Policy in the European Community from a Constitutional Law Perspective’ (2002) *Managerial Law*, Vol. 44 No. 4, 59-76, at 65.

¹⁵⁴ Ibid.

¹⁵⁵ J.A.E Vervaele, *Fraud against the Community. The Need for European Fraud Legislation* (Kluwer Law and Taxation Publishers, 1992), at 85-89.

¹⁵⁶ Case 68/88 *Commission v. Greece* [1989] ECR 2965.

financial interests as they take to counter fraud affecting their own financial interests'. As a result, national law was used to protect the Community budget.

In practice the principle of assimilation had a limited value. The degree of protection varied from one state to another. There was no common definition of what constituted fraud, and it was up to national laws of Member States to define the offence and sanctions. In the 1990s, the cooperation against Community fraud was further enhanced, and Member States decided to re-examine the Commission's proposal from 1976.¹⁵⁷ In 1994, the Council recognised the need for greater compatibility as to the definition of fraud and applicable sanctions.¹⁵⁸

In the second half of the 1990s, the Treaty of Maastricht gave the EU competence to adopt legal instruments in the area of police and judicial cooperation in criminal law, and it became possible to strengthen the protection of financial interests. The legal instrument designed to improve the fight against fraud was the PIF Convention adopted in 1995. It introduced a common definition of fraud affecting the Community budget, which was accepted by all Member States. The PIF Convention introduced two separate but matching definitions of fraud, one applying to expenditure, the other to revenue. For the purposes of the Convention, fraud affecting the Community's budget was defined as:

- a) in respect of expenditure, any intentional act or omission relating to:
- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,
 - non-disclosure of information in violation of a specific obligation, with the same effect,
 - the misapplication of such funds for purposes other than those for which they were originally granted;
- (b) in respect of revenue, any intentional act or omission relating to:

¹⁵⁷ Council Resolution of 13 November 1991 concerning the protection of the financial interests of the Communities', OJ C328/1, 17.12.1991.

¹⁵⁸ Council Resolution of 6 December 1994 on the legal protection of the financial interests of the Communities, OJ C 355, 14.12.1994, para 2.

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,
- non-disclosure of information in violation of a specific obligation, with the same effect,
- misapplication of a legally obtained benefit, with the same effect.¹⁵⁹

In this context, it is important to draw a distinction between the concepts of 'fraud' and 'corruption'. Both concepts have been defined and distinguished at the EU level and the EU addresses the problem of corruption in a separate policy document. The distinction between these two concepts is also recognised in the literature. According to Huberts:

...public functionaries are *corrupt* when they act (or do not act) as a result of the personal rewards offered to them by interested outside private actors' and 'public *fraud* is private gain at public expense, damaging the group or organization to which the functionary belongs, without the involvement of external beneficiaries.'¹⁶⁰ (emphasis in original).

In addition, Van Duyne pointed out that: 'corruption is an "exchange relationship" between a decision maker and an interested person offering or promising an advantage in exchange for a desired decision outcome, whereas fraud can in principle be committed as a solitary act.'¹⁶¹ Corruption may lie behind fraud and other irregularities. For instance, a public official in return for a bribe may accept false or incomplete documents, and in result an economic operator is exempted from paying customs duties. Therefore, many aspects of the fight against fraud and irregularity, especially its prevention and investigation, can contribute to revealing cases of corruption.

By virtue of the PIF Convention, the Member States agreed to make 'fraud' a criminal offence under their national laws and to provide for effective, proportionate and

¹⁵⁹ Article 1 of the PIF Convention.

¹⁶⁰ L.W. J.C. Huberts, 'What can be done against public corruption and fraud: Expert views on strategies to protect public integrity' (1998) *Crime, Law and Social Change* 29, 209-224, at 211.

¹⁶¹ P.C. van Duyne, 'Will "Caligula" go transparent?' (2001) *Forum on Crime and Society*, Vol. 1 No. 2, 73-98, at 74.

dissuasive criminal penalties including deprivation of liberty which can give rise to extradition.¹⁶² The PIF Convention also obliged Member States to introduce liability of heads of businesses or any person having power to take decisions or exercise control within a business in cases of fraud committed by a person under their authority acting on behalf of the business.¹⁶³

The importance of the PIF Convention also stems from the fact that it introduced the rules on judicial cooperation in cases of cross-border fraud. To that end, Articles 4 and 5 laid down common rules on the jurisdiction, extradition and prosecution, designed to ensure that national laws of Member States do not provide for loopholes to avoid prosecution for fraud. One of the requirements of the PIF Convention is a duty of each Member State to establish jurisdiction over fraud when committed by its own nationals outside its territory, if under its law it does not extradite its own nationals.¹⁶⁴ Article 6 goes on to provide for a closer cooperation between Member States in investigation and prosecution in order to facilitate the detection and punishment of fraud in cases involving more than one country. This could be achieved by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State. In cases of conflicts of jurisdiction, Member States are also obliged to cooperate in deciding which Member State shall prosecute with a view to centralizing the prosecution in a single Member State. Furthermore, Article 7 contains the '*ne bis in idem*' principle which means that a person whose trial has been finally disposed of in one Member State could not be prosecuted in another Member State in respect of the same facts, save in the exceptional circumstances listed in the Convention.

At the same time, the EU also took initiatives under the EC Treaty to harmonise systems of administrative sanctions. In 1995 the Council adopted the Regulation on the protection of the EC financial interests (PIF Regulation).¹⁶⁵ It defined the administrative

¹⁶² Article 2 of the PIF Convention.

¹⁶³ Article 3 of the PIF Convention.

¹⁶⁴ Article 5 (1) of the PIF Convention.

¹⁶⁵ Council Regulation 2988/95 (n 137).

concept of irregularity against the budget of the Community.¹⁶⁶ The PIF Regulation provided the Commission with authority to carry out administrative checks and apply administrative sanctions in the protection of the EC financial interests. It was the first a 'horizontal'¹⁶⁷ instrument, which meant that it provided a framework for the general anti-fraud activities carried out across all sectors of the Community budget.

Shortly after, in 1996 the Council supplemented the PIF Regulation with a Regulation on basis of which the Commission, in practice OLAF, was empowered to carry out on-the-spot administrative checks and inspections at central, regional or local level on any economic operator directly or indirectly receiving a financial benefit from the Community budget, for detection of frauds and irregularities detrimental to the financial interests of the EC.¹⁶⁸ Pursuant to Article 2 of this Regulation OLAF can carry out inspections in cases of serious or complex transnational cases of fraud and irregularities, or at the request of the Member State concerned. Without hindering the powers of the Member States, in Article 4 the Regulation permits the Commission to carry out checks at its own initiative, after informing the relevant national authorities. On the basis of Articles 7 and 8, OLAF has access to all relevant documents under the same conditions as national inspectors, and its reports have the same evidential value in administrative and judicial proceedings.

Adoption of the above measures signalled an important change of policy and enhanced the protection of Community financial interests. In 1994, the Council recognised that Member States should take effective measures to punish bribery involving Community officials in relation to the financial interests of the EC.¹⁶⁹ The first EU instrument against corruption was adopted in the context of a general realization that there was a need to reinforce the protection of the Community budget. It was not introduced because of a recognition that corruption posed a general threat for the rule of

¹⁶⁶ Article 1(2) of the PIF Regulation.

¹⁶⁷ S. White, 'Proposed Measures Against Corruption of Officials in the European Union' (1996) *European Law Review* 21 465-476, at 466.

¹⁶⁸ Council Regulation 2185/96 (n 137).

¹⁶⁹ Council (n 158).

law, economic development and good governance, which had driven the first anti-corruption initiatives of the Council of Europe. As demonstrated throughout this thesis, the assumption that anti-corruption policy at the EU level should serve other objectives of European integration, such as protection of financial interests or proper functioning of the internal market, instead of being an objective in itself, is a premise of the EU policy against corruption.

2.1.1. First Protocol

In 1995 Transparency International in its memorandum to the EU institutions pointed out that 'the EU was not aware of the role it was able to play in countering international corruption, leaving this matter rather to Member States or to larger international agencies, in particular the OECD.'¹⁷⁰ There are two main factors explaining why the first EU anti-corruption initiatives did not take place before the mid 1990s. First, as already discussed in Chapter One, corruption became an important issue of international cooperation only in the second half of the 1990s. Therefore, the EU initiatives were not late in comparison to other international bodies. In fact, the EU anti-corruption instrument adopted in 1996 focused on the criminalization of transnational bribery for the first time in Europe.¹⁷¹ Secondly, the EU gained a competence in the area of criminal law only in 1993 when the Treaty of Maastricht entered into force and the first anti-corruption instrument was adopted on the basis of the EU Treaty.

The motivation behind the adoption of the first EU anti-corruption instrument was very similar to the reasons that led to the adoption of the PIF Convention. Cross-border corruption very often exploits the legal and technical possibilities offered by global markets. This is especially the case within the EU, where criminals are able to take advantage of the lack of internal frontiers. Just as in the case of fraud, there was a need to ensure greater convergence among the criminal laws of Member States. Similar

¹⁷⁰ Transparency International (n 64).

¹⁷¹ M. Pieth, 'The Harmonization of Law Against Economic Crime' (1999) *European Journal of Law Reform*, Vol. 1 No. 4, 527-551, at 538.

to the anti-fraud policy area a major problem in the 1990s was the lack of a commonly agreed definition across the Member States of what constituted corruption.¹⁷² Hence, some practices which were considered as corrupt under criminal laws of one Member State were not offences in other Member States. At the same time, it was recognized that while the definitions of corruption offences varied across Member States, they had common elements that made it possible to arrive at a single definition.¹⁷³

A principal weakness in the fight against transnational corruption was that the criminal laws of Member States were very often limited to nationals and did not apply to Community officials or officials of other Member States.¹⁷⁴ For instance, the criminal laws of a Member State did not extend to situations where its nationals instigated corruption of officials of another Member States on its own territory. Moreover, as already mentioned in Chapter One, in some Member States such bribes were tax deductible as a customary business practice.

Combined with these problems, a growing number of Community officials involved in the distribution of Community funds created opportunities of corruption. There was thus a pressing need for European action to complement what was done at the national level. Just as in the case within the internal market *acquis* under the first pillar, there was a need for regulation at least at a minimum level; as otherwise the offenders would concentrate on a country with the weakest commitment to fight corruption and commit a crime in a system that offered them impunity. This could lead to a 'race to the bottom' in which the standards in the Member States with the weakest anti-corruption regime would prevail across the EU. As Weyembergh pointed out, even the criminals who are not aware of the legal diversity or do not take advantage of it, benefit at least indirectly from the lack of unity, as '...the practitioners of criminal justice systems have

¹⁷² Commission (EC), 'Communication from the Commission to the Council and the European Parliament on a Union Policy Against Corruption', COM(97) 192 final, 21.5.1997, at. 2.

¹⁷³ Explanatory Report on the Protocol to the Convention on the protection of the European Communities' financial interests OJ C 11, 15.1.1998.

¹⁷⁴ Ibid.

to face the heterogeneity of substantive and procedural criminal laws, which increases the complexity of the fight against cross-border crime ...¹⁷⁵

What specific circumstances led to the first EU anti-corruption instrument in 1996? Already in 1995 the EP had adopted a resolution on combating corruption in Europe, where it recognised that the EU ‘must equip itself with its own policy of combating corruption that would enable it to establish both the requisite preventive and repressive measures.’¹⁷⁶ Most importantly, the EP called to take fight against corruption beyond the protection of the EC financial interests and address it in a more general way. It further called on the Member States to take action against corruption in a number of policy areas, such as tax legislation and other legal provisions that indirectly encouraged corruption, including the funding of political parties and the rules on declaration of interests. These recommendations of the EP had no legal force and Member States were not bound to take any action, but they did have an important political significance. As discussed later in the Chapter, the EP on many occasions presented a much broader vision of EU anti-corruption policy than the Commission. It has been a strong advocate of developing all-encompassing policy that addresses corruption as a general threat to the rule of law and democracy within the Member States.

The legislative response to the EP resolution was modest. The first anti-corruption instrument was the First Protocol¹⁷⁷ adopted in 1996. It was adopted to reinforce the protection of the Community budget and only corruption actually or potentially damaging the EC financial interests was regulated by the EU legislator. While the specific provisions of the First Protocol are discussed in more detail in Chapter Three, here it suffices to say that it introduced common definition of corruption and established the basis for judicial cooperation among Member States, adapting the relevant rules of the PIF Convention. To that end, Article 7 of the First Protocol

¹⁷⁵ Weyembergh (n 106), at 1579.

¹⁷⁶ European Parliament, ‘Resolution on combating corruption in Europe’ (1995) A4-0314/1995, OJ C 17, 22.1.1996.

¹⁷⁷ See (n 26).

stipulates that provisions of the PIF Convention with regard to the criminal liability of the heads of business, extradition, cooperation and *ne bis in idem* apply also to the First Protocol.

The First Protocol also lists a number of situations in which Member States are to establish their jurisdiction. It is obligatory for a Member State to establish jurisdiction when the offence is committed in whole or in part within its territory.¹⁷⁸ According to Article 6, jurisdiction can also be established in three more cases. First, where the offender is one of its nationals or one of its officials, a Member State may establish its jurisdiction for offences committed abroad, within or outside the EU.¹⁷⁹ Note, however, that Member States that do not extradite their own nationals must establish jurisdiction in cases when the offence is committed by their nationals outside its territory.¹⁸⁰ Second, a Member State can prosecute where the offence is committed against a national of that Member State. And, third, a Member States may establish its jurisdiction where the offender is a Community official working for a Community institution with its headquarters in the Member State concerned. Such regulation leads to a situation where many Member States may claim jurisdiction to prosecute the same offence. This, in turn, may lead to conflicts about which Member State should take action. To alleviate this difficulty, the First Protocol introduced the obligation for Member States to cooperate in deciding which should prosecute.¹⁸¹

The scope of the offence of corruption was subsequently extended when the Second Protocol¹⁸² to the PIF Convention was signed in 1997. The Second Protocol introduced (1) the legal liability of legal persons for active corruption¹⁸³, (2) criminalisation of laundering of the proceeds of corruption¹⁸⁴ and (3) the duty to take the necessary measures to enable the seizure, confiscation or removal of the instruments and

¹⁷⁸ Article 6(a) of the First Protocol.

¹⁷⁹ Explanatory Report (n 173).

¹⁸⁰ Article 7 of the First Protocol and Article 5 of the PIF Convention.

¹⁸¹ Article 7 of the First Protocol and Article 6 of the PIF Convention.

¹⁸² See (n 27).

¹⁸³ Article 3 of the Second Protocol.

¹⁸⁴ Article 2 of the Second Protocol.

proceeds of active and passive corruption.¹⁸⁵ The scope of the Second Protocol was also limited to protection of the Community financial interests.

The legal framework created by the First and Second Protocols filled in the necessary gaps in the criminal laws of Member States and improved the prosecution and judicial cooperation in cases of cross-border corruption. It is evident that the main goal of the EU legislator, in this phase of policy development, was not to address the problem of corruption in general, but to reinforce the protection of the Community financial interests. The clear indication of this is the requirement of damage to the financial interests of the EC and the fact that neither of the instruments addresses the problem of corruption of third-country officials.

2.2. Phase Two: Beyond the protection of the Communities' financial interests

In the next phase of policy development the EU legislator started to address corruption not only as a danger to the Community budget, but rather as a serious crime that poses a threat to the rule of law. Since 1997, the EU has begun developing a common approach against corruption in the context of organised crime. As was acknowledged by the EP:

...there are numerous connections between corruption and organised crime, which can entail special dangers for the democratic rule of law and the market economy, particularly if organised crime succeeds with the help of corruption in penetrating public administration or the legal system, because in so doing they gain access to important information and thus can increase their opportunity for exploiting legal structures for illegal purposes...¹⁸⁶

As observed in Chapter One, the danger of the links between corruption and organised crime was also recognised by international initiatives. At the EU level, also the Council recognised that a comprehensive policy against corruption should be an integral part of

¹⁸⁵ Article 5 of the Second Protocol.

¹⁸⁶ European Parliament (n 65), at 6.

the EU strategy against organised crime.¹⁸⁷ The importance of the fight against corruption was subsequently confirmed by the Council Resolution in 1998 on the prevention of organised crime¹⁸⁸ and the EU strategy on the prevention and control of organised crime in 2000.¹⁸⁹

As already mentioned above, in 1997 Member States adopted the Anti-Corruption Convention¹⁹⁰ specifically to take combating corruption beyond the protection of the Community financial interests. Since the goal was still to improve judicial cooperation in criminal matters among Member States, thus the content of this Convention is structured in a comparable way to the First Protocol, and many provisions derive from the PIF Convention and the First Protocol. However, there is one crucial difference: the Anti-Corruption Convention is not restricted to the protection of the Community budget and therefore has a wider scope than the First Protocol. It provides for criminalisation of all bribery conduct involving a Community's or Member States' officials and not just that linked to protection of the Community financial interests.¹⁹¹

The independence of the anti-corruption measures from the protection of the EC financial interests was confirmed in 1998 with the adoption of the Joint Action on corruption in the private sector.¹⁹² It was the first EU measure addressing purely domestic cases of corruption within Member States and focusing on the impact of corruption on the internal market. The preamble to the Joint Action explicitly stated that: '...corruption distorts fair competition and undermines the principles of openness and freedom of markets, and in particular the smooth functioning of the internal market, and also militates against transparency and openness in international trade...' The Framework Decision on combating corruption in the private sector, which replaced the

¹⁸⁷ Council Action Plan to combat organized crime, OJ C 251, 15.08.1997, recommendation 6.

¹⁸⁸ Council Resolution of 21 December 1998 on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it, OJ C 408, 29.12.1998, paras 12,13 and 14.

¹⁸⁹ Council (n 86).

¹⁹⁰ See (n 67).

¹⁹¹ Articles 2 and 3 of the Anti-Corruption Convention.

¹⁹² See (n 63).

Joint Action in 2003, put the fight against corruption at the EU level into even broader context, as it referred to corruption as a threat to a 'law-abiding society', and 'impeding sound economic development.'¹⁹³

2.3. Phase Three: A comprehensive policy against corruption

In 1997 the Council expressed the political will to develop a comprehensive anti-corruption policy at the EU level.¹⁹⁴ In response, the Commission presented a Communication on a Union Policy against Corruption (the First Communication)¹⁹⁵, where it argued for the adoption of an anti-corruption strategy both within and outside EU borders. The Commission expressed the view that such a policy should encompass international trade and competition, Community expenditure abroad, Community own resources, development co-operation policies and the pre-accession strategy.¹⁹⁶ According to the Commission 'ideally the criminal law within the Union should address the bribery of EC officials, the bribery of officials of other Member States, the bribery of officials from states outside the Union and private sector corruption.'¹⁹⁷ In 1998 the EP in its report on the First Communication, advocated the policy at the EU level, because '... although each of the EU Member States has anti-corruption measures of its own, they diverge markedly in their legal impact, range and practical application, resulting in a disparate and patchy anti-corruption system for the EU as a whole.'¹⁹⁸

One question that emerged concerned what aspects of this policy would deal with corruption within the Member States. From the very beginning the Commission made it clear that it did not advocate complete harmonisation of Member States' laws and policies on corruption, but only a common approach in certain key areas.¹⁹⁹ This

¹⁹³ See (n 55), para 9.

¹⁹⁴ Council (n 187).

¹⁹⁵ Commission (n 172).

¹⁹⁶ Ibid, at 1.

¹⁹⁷ Ibid, at 4.

¹⁹⁸ European Parliament (n 65), at 6.

¹⁹⁹ Commission (n 172), at 3.

view of the Commission is not surprising, as harmonisation of anti-corruption policies is politically inconceivable. Moreover, the harmonisation of national policies in this area should never be a goal of the EU legislator. The Council of Europe's Twenty Guiding Principles against corruption (See Appendix 1), the most comprehensive policy guidelines in this area, do not harmonise the national laws, but their importance lies in the fact that the countries are constructing national anti-corruption laws in line with the goals indicated by these principles.

The Commission's intention to prevent and combat corruption was confirmed in 2003 with the adoption of the Communication on a Comprehensive EU Policy against Corruption (the Second Communication).²⁰⁰ The Commission proposed a very ambitious scope for this policy. In the Commission's view, 'comprehensive' policy means reducing corruption 'at all levels in a coherent way within the EU institutions, in EU Member States and outside the EU.'²⁰¹ According to the Commission, the EU is an appropriate actor to take initiatives to reduce corruption within the Member States, including political corruption, corrupt activities committed by and collusively with organised crime groups, private-to-private corruption and so-called petty corruption.²⁰² The Commission also pointed out the necessity of political commitment from EU governments to combat and prevent corruption and to accept their responsibility to promote and live up to the anti-corruption standards.²⁰³ In the assessment of the Transparency International, the Second Communication reflected 'real change' that has occurred during the last few years, including heightened awareness of the disastrous consequences of corruption and concrete steps taken against it at EU level.²⁰⁴

²⁰⁰ Commission (n 65).

²⁰¹ *Ibid*, at 5.

²⁰² *Ibid*.

²⁰³ *Ibid*, at 7.

²⁰⁴ Transparency International (n 150), at 2.

The texts of the First and the Second Communication, together with the reports of the EP prepared in response to them, included a number of more specific policy recommendations for Member States.²⁰⁵ Examples include:

- to conduct legislative simplification and debureaucratisation of their public sectors;
- to tackle corruption in the political sphere by guaranteeing the transparency of funding of political parties;
- to introduce common standards for the collection of evidence, special investigative techniques, protection for whistleblowers, victims and witnesses of corruption and the confiscation of the proceeds of corruption;
- to ensure that appropriate remedies are available for victims of corruption and introduce clear rules for the protection of whistleblowers in public administration;
- to establish bodies specialised in the fight against corruption and guarantee the independence of specialised anti-corruption authorities and Member States' officials fighting against corruption and related economic crimes such as fraud, money laundering, and tax and accounting offences;
- to introduce rules and codes of conduct aimed at preventing conflicts of interest for public authorities whose activities are susceptible to private-sector interests;
- to ensure freedom of media and freedom of information.

All the above guidelines for domestic policies were set out by both the Commission and the EP. They were not presented in any systematic or coherent way. They have no legal force, and Member States are not bound to take them into account. In practice, '...the

²⁰⁵ European Parliament, 'Report on the communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee-On a Comprehensive EU Policy Against Corruption (COM(2003) 317-2003/2154(INI)), A5-0367/2003, PE 329.915, 4.11.2003; European Parliament (n 65); Commission (n 65) and (n 172).

Commission with the legal competence to raise the issue of corruption in a particular Member State with the government responsible or with the Council.²⁰⁶

The most comprehensive set of principles for improving the fight against corruption at the EU level was presented by the Commission in the Annex to the Second Communication in 2003 (See Appendix 2). While their content will be discussed in more detail in Chapter Six, here it is important to note that they were addressed only to acceding, candidate and other third countries. This is not only proof of the double standards applied towards the candidate countries, but it also shows the weak position of the Commission in relation to Member States in the area of anti-corruption. In response to the Second Communication, the EP called upon the Commission to require the candidate countries and the Member States make equivalent efforts in the fight against corruption and draw up a set of principles with a view to stepping up the fight against corruption, both in the accession countries and in the Member States, based on the Council of Europe's Twenty Guiding Principle, and to submit a report every two years to the Council, the EP and the national parliaments.²⁰⁷ However, during discussions with the Council, the Commission deplored that 'the Member States are not willing to express their support to the Ten Principles for Improving the Fight against Corruption in Acceding, Candidate and other Third Countries, set out in the Annex to its Communication, but merely "notes" these principles in the draft Council Resolution.'²⁰⁸

The Second Communication, however, has also set clear limits for EU action in the area anti-corruption. The Commission is aware of the role played by the other international agencies in this area, in particular the UN, the OECD and the Council of Europe, and wants to take advantage of their initiatives. Therefore, it only recommends that '...mainly those measures should be strengthened and supported at EU level, which

²⁰⁶ F. Frattini, Parliamentary questions E-3601/04, (1 April 2005)

²⁰⁷ European Parliament (n 205), at 9.

²⁰⁸ Council of the European Union, 'Draft Council Resolution concerning a comprehensive EU policy against corruption. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy against Corruption', 6150/05, 11.2.2005.

are not already substantially covered, or not with the same degree of mandatory character as EU instruments, by international organisations.²⁰⁹ This position deserves only partial support. It is in the EU's vital interest to support international initiatives and especially to encourage Member States' participation in international anti-corruption efforts. Such support, however, should not lead to complete reliance on these initiatives and, in consequence, the neglect of the problem of corruption within Member States.

Conclusion

The area of anti-corruption policy is dominated by Member States' competences and EU initiatives affect only some aspects of national anti-corruption strategies. There are both legal and political constraints limiting the EU's influence. Under the first pillar, the Community has almost no legal power. It can only regulate corruption affecting the EC financial interests and adopt measures within its internal market legal framework, having merely incidental impact on the national policies in this area. Under the third pillar, the EU competences are broader but still limited by the intergovernmental nature of judicial and police cooperation in criminal matters. Nor does Title VI of the EU Treaty clearly give the EU competence to institute Member States to come to common standards. As a result, the EU created a framework that forces the Member States to comply only with certain minimum standards, focusing on cross-border corruption.

Nevertheless, there are legal tools available under the EU Treaty which could be used to establish a more coherent framework for preventing and combating corruption within the Member States. Any progress in this area depends, however, on the political will of the Member States. The entry into force of the Treaty of Lisbon would enhance the quality and effectiveness of EU decision making in the area of anti-corruption. The introduction of qualified majority voting would help to overcome the problem of cutting the decisions down to the lowest possible standards acceptable to all Member States. The quality of the anti-corruption measures would also be increased by greater

²⁰⁹ Communication (65), at 5

parliamentary and judicial scrutiny over the legal instruments and improved monitoring of the implementation of EU measures by the Member States.

The main objective of the EU, since its inception, was to create the internal market. Therefore, the EU initiatives in the field of anti-corruption have served in achieving this objective. This is a critical difference between the EU and the Council of Europe, the leading organisation in the field of anti-corruption at the pan-European level. The Council of Europe's mandate is to promote democracy and the rule of law, and in both domains the fight against corruption plays a crucial role. The EU, meanwhile, responded to the problem of corruption in its own unique way. Initially, the focus was on corruption affecting the Community's financial interests. Over time the policy developed to address corruption in a more general way. The Commission declared that prevention and the fight against corruption constituted an important element of EU policy. The Commission and the EP both formulated many, often far-reaching, recommendations for the Member States on how they should construct their national anti-corruption policies. These recommendations are, however, incoherent, spread across various policy documents and, most importantly, not binding for the Member States, which do not have to take them into account. This Chapter gave an overview of the broad anti-corruption policy framework. The next Chapter moves on to discuss the actual legislative measures taken by the EU to address the problem of corruption within the Member States and analyse how these measures correspond to policy guidelines.

The EU strategy against corruption within the Member States

It is in the EU's vital interest to ensure that all the Member States have in place effective policies for preventing and combating corruption. The premise of the EU legal system is that *acquis* is correctly implemented and enforced by public administration and courts in the Member States. However, widespread corruption within Member States constitutes a threat to the correct application of EU policies and effective implementation of the *acquis*. It carries particular dangers in the area of freedom, security and justice, where policy increasingly relies on mutual recognition and trust among Member States. The evidence of corruption in the police or in the courts has a destructive effect on that trust among Member States.

Corrupt practices undermine the legitimacy of judgements and arrest warrants issued by judicial authorities across Member States. In addition, criminal organisations and terrorists may use corruption to penetrate the structures of Member States and pursue their illicit goals. Above all, however, corruption undermines the principles of democracy and the rule of law, which as prescribed in Article 6 EU Treaty are fundamental to the functioning of the EU and common to all Member States. To prove its commitment to these principles, the EU must have a genuine policy addressing the problem of corruption within its Member States.

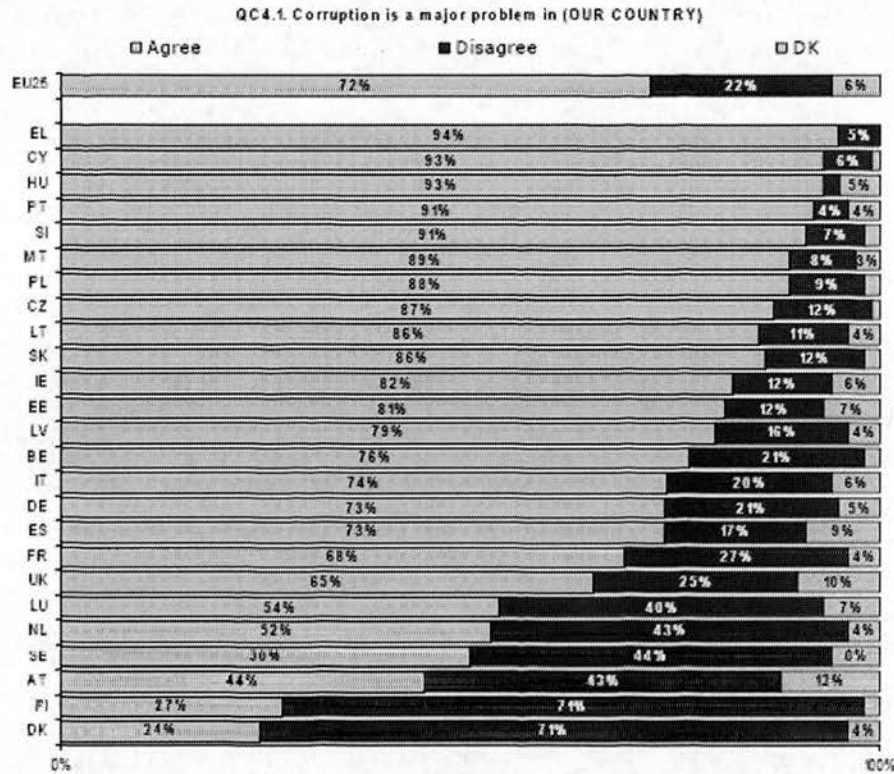
One other important reason for developing a more comprehensive policy against corruption across Member States is that corruption poses a danger for the regular distribution of EU funds. In particular, around 80% of EU funds are under shared management by the Commission and the Member States.¹ It is mainly the responsibility of Member States to ensure an effective system of control for these funds. The prevalence of corruption connected with the distribution of EU funds within Member States is confirmed in the reports of GRECO. For example, the 2001 GRECO evaluation reports on Greece observed that one of the most common forms of corruption is the bribery of public officials in return for their assistance in obtaining subsidies or aid from EU funds.²

¹ Commission (EC), 'Report from the Commission to the European Parliament and the Council. Protection of the financial interests of the Communities – Fight Against Fraud – Annual report 2006' COM(2007)390, 6.7.2007, at 5.

² GRECO, 'Evaluation Report on Greece', Greco Eval I Rep (2001) 15E (17 May 2002), at 3 <[http://www.coe.int/t/dg1/greco/evaluations/round1/GrecoEval1\(2001\)15_Greece_EN.pdf](http://www.coe.int/t/dg1/greco/evaluations/round1/GrecoEval1(2001)15_Greece_EN.pdf)> accessed 14 December 2007.

The need for such policy is also evident in the fact that corruption is seen as a serious issue by EU citizens.

Figure 3.1: Corruption as a major problem in 25 Member States



Source: Special Eurobarometer, 'Opinions on organised, cross-border crime and corruption' (2006) <http://ec.europa.eu/public_opinion/archives/ebs/ebs_245_en.pdf> accessed 15 December 2007.

As can be seen from Figure 3.1, almost three-fourths of EU citizens agreed with the statement that corruption is a major problem in their country. In ten of the EU's 25 Member States over 85% of survey respondents agreed with the statement. Meanwhile, only three countries (Denmark, Finland and Austria) did not have a clear majority that agreed with the statement.

There is also evidence from the Transparency International Global Corruption Barometer 2007 that in over half of the European countries surveyed, a majority of

citizens think that their government's efforts to fight corruption are ineffective. In six old Member States (Germany, Greece, Ireland, Italy, the Netherlands and the United Kingdom), over 50% of citizens believe this is the case. In Germany, a shocking 77% believe the German government's efforts to tackle corruption are ineffective. (See Figure 3.2)

Figure 3.2: The government's efforts to fight corruption

Country/Territory	Percentage of respondents who think their government efforts to fight corruption are...		
	Effective	Neither effective nor ineffective	Ineffective
EU+	28%	12%	60%
Austria	30%	24%	46%
Bulgaria	14%	15%	72%
Czech Republic	14%	22%	64%
Denmark	34%	42%	25%
Finland	31%	26%	42%
France	37%	25%	38%
Germany	20%	3%	77%
Greece	26%	15%	59%
Iceland	18%	37%	45%
Ireland	46%	3%	52%
Italy	21%	8%	70%
Lithuania	9%	14%	77%
Luxembourg	26%	37%	37%
Netherlands	39%	11%	51%
Norway	15%	47%	38%
Poland	22%	30%	48%
Portugal	23%	13%	64%
Romania	26%	19%	55%
Spain	42%	6%	51%
Sweden	24%	33%	44%
Switzerland	35%	32%	33%
United Kingdom	34%	2%	64%

Source: Transparency International Global Corruption Barometer 2007
 <http://www.transparency.org/policy_research/surveys_indices/gcb> accessed 14 December 2007.

As observed in Chapter Two, the need for a comprehensive policy against corruption was recognised across the EU institutions in the second half of the 1990s. It was also acknowledged that preventing and combating corruption within the Member

States should be one of the goals of this policy. This chapter analyses how the actual measures taken by the EU correspond with the policy framework and examines whether the EU addresses corruption within the Member States in a coherent and adequate way.

To this end the chapter begins with a discussion of a legislative and institutional anti-corruption framework developed by the EU under both the first and third pillars. First, it analyses the preventive character of the Community *acquis* in the area of the single market and then moves on to elaborate on the approximation of the offence of corruption by the EU instruments adopted under the EU Treaty. It points out the very limited scope of these instruments using the relevant initiatives of the Council of Europe and the UN as a point of reference. The chapter further outlines how corruption is one of the thirty two generic offences which are subject to an intensified cooperation at the EU level on the basis of mutual recognition. Next, the chapter examines the anti-corruption dimension of the EU anti-money laundering legislation and notes that in this area the EU regularly updates its standards in accordance with the latest international initiatives. The chapter also discusses the monitoring of EU anti-corruption measures and argues that it is a fragmented and ineffective process. Finally, the chapter examines the ways in which the EU cooperates and takes advantage of other international initiatives in the area of anti-corruption.

1. EU legislative and institutional framework

1.1. The first pillar measures

The anti-corruption standards are developed by the Community in the framework of the single market legislation adopted on the basis of Article 95 EC. The legal measures adopted in this area have a non-criminal, administrative character, and their goal is to ensure fair competition and the proper functioning of the internal market. Although combating corruption is not their primary objective, they contribute usefully towards the prevention of corruption.

One of the areas of the Community *acquis*, where such anti-corruption standards are developed is public procurement, which is the process used by governments, regional and local public authorities to obtain goods, works and services. The primary purpose of public procurement legislation is to ensure transparency in selection procedures and equal access for those seeking to gain public contracts.

Public procurement is particularly vulnerable to corrupt practices and favouritism. Companies participating in a tender may be tempted to use bribes to obtain contracts. As a result, corrupt public officials purchase goods or services from a company that gives the highest bribe, rather than from the best bidder. Fair and transparent procedures for the awarding of contracts and appropriate judicial appeal procedures limit the danger of corruption. The Commission recognises that 'whilst transparent procedures are not sufficient in themselves to eradicate fraud and corruption, an effective and dissuasive system of monitoring, procedural checks and proportional penalties helps to protect against breaches of public trust.'³ In a study on the prevention of corruption in the Member States conducted in 1998 for the EP, one of the highest priorities identified was the need for transparency in regard to award procedures for public contracts.⁴ In 1997 and 2000 the Council called on the Member States and the Commission to ensure that the applicable legislation provides for the 'possibility that an applicant in a public tender procedure who has committed offences connected with organised crime can be excluded from the participation in tender procedures conducted by Member States and the Community.'⁵

³ Commission (EC), 'Green Paper. Public Procurement in the European Union: Exploring the Way Forward' 27.11.1996, at 4 <http://ec.europa.eu/internal_market/publicprocurement/docs/green-papers/com-96-583/com-96-583_en.pdf> accessed 15 December 2007.

⁴ European Parliament, 'Measures to prevent corruption in EU Member States' (1998) Working Paper JURI 101 EN, at 2 <http://www.europarl.europa.eu/workingpapers/juri/pdf/101_en.pdf> accessed 14 December 2007.

⁵ Council of the European Union, 'The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium' 6611/00, 3.3.2000, recommendation 2; Council Action Plan to combat organized crime, OJ C 251, 15.08.1997, recommendation 7.

Two Public Procurement Directives⁶ adopted in 2004 govern the opening of public procurement in Member State to the EU wide competition. They apply only to public contracts above certain thresholds, which are revised by the Commission every two years.⁷ The Directives provide for the mandatory exclusion of candidates for participation in a criminal organisation, corruption, fraud or money laundering.⁸ The offence of corruption is defined by reference to Article 3 of the Anti-Corruption Convention and Article 3(1) of the Joint Action on combating corruption in the private sector. This exclusion is limited to economic operators convicted by the final judgment of the court. In addition, the economic operator may be excluded from participating in a contract if he or she has been convicted by a final judgment of any offence concerning his professional conduct or has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate.⁹ The court proceedings can take a long time, and there might be convincing evidence of corruption even where there is no final conviction. The Directives cover such situations as well, as corruption constitutes a grave professional misconduct and convincing evidence would be sufficient to blacklist the candidate.¹⁰

The exclusion of persons or companies who engage in corrupt practices from public contracts for a specified period of time, so called blacklisting, is one of the most effective means of preventing corruption. For companies it means loss of contracts and a damaged reputation. Holding a company accountable for corruption among their employees increases the potential costs of corruption and therefore should encourage companies to devise their own internal anti-corruption policies. Blacklisting has been used at both international and national levels. One of the examples includes the system

⁶ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134/114, 30.4.2004; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134/1, 30.4.2004.

⁷ Article 69 of the Directive 2004/17/EC

⁸ Article 45 (1) (b) of the Directive 2004/18/EC; Article 53(3) of the Directive 2004/17/EC

⁹ Article 45(2) (c) and (d) of the Directive 2004/18/EC

¹⁰ Transparency International, 'Fighting Corruption at EU level. Progress Report 1995-2004' (2004) Working Paper, point 11.

run by the World Bank whereby publicly listed firms and individuals who, as a result of an administrative process, were found to have violated the World Bank anti-corruption provisions, are ineligible to be awarded a World Bank-financed contract for certain periods.¹¹

In theory, the Public Procurement Directives introduce a framework whereby a person or a company convicted for corruption may be excluded from public procurement across the EU. In practice, the effectiveness of such a framework is not guaranteed, as too much depends on the contracting authority taking action, in case of doubt or of being unaware of such a conviction. The contracting authority must be aware of conviction by final judgement before it can exclude an economic operator. Only in cases of suspicion should the contracting authority contact the relevant national authorities, including authorities of other Member States, which otherwise do not have a duty to inform about convictions of their national companies willing to participate in a public tender in other Member States.¹² In fact, the Member States may be unwilling to inform about such convictions if as a result the national companies would be excluded from contracts in other Member States. The contracting authority can also ask the economic operators to supply the relevant documents, such as an extract from the judicial record or of an equivalent document issued by a competent judicial or administrative authority, to confirm whether they have been convicted for corruption or not, but it would do so only in cases of suspicion.¹³

This policy could be improved. A public register of companies' criminal convictions run centrally by the EU and open to all national contracting authorities would offer a better solution. It would guarantee that companies convicted for corruption were excluded in all Member States. Another option would be a system whereby

¹¹ World Bank Listing of Ineligible Firms:

<<http://web.worldbank.org/external/default/main?contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&querycontentMDK=64069700&theSitePK=84266#excerpts> > accessed 15 December 2007.

¹² Article 45(1) of the Directive 2004/18/EC.

¹³ Article 45(3) Directive 2004/18/EC.

companies receive positive checks before they can take part in a tender. The systematic requirement for companies to provide proof that they have not engaged in corrupt practices would prevent corruption in a more effective way than the current regulation.¹⁴ However, the Public Procurement Directives do not foresee such a system, and the introduction of any such rules at the national level would be regarded as an infringement of Community law. This was confirmed by the Commission's decision in 2007 to take legal action against Greece concerning legislation that stated that in order to avoid disqualification, all tenderers must make an official declaration that they have not been convicted of any charge of corruption.¹⁵

The Community law also provides review procedures for decisions taken by contracting authorities and compensation of persons harmed by infringements of public procurement rules.¹⁶ Member States must ensure that review procedures are available at least to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement.¹⁷ In June 2006 the Commission presented a proposal for a Directive strengthening national rules on remedies.¹⁸ The objective of the proposal is to ensure better prevention of the signing of public contracts which have been concluded illegally. It provides for a 'standstill period' before the contract can actually be signed to give bidders time to examine the

¹⁴ White proposed an EU-wide 'white list', where tenderers would provide proof that they meet EU-agreed criteria and agree to checks being carried out by the national authorities, see: S. White, (ed) 'Procurement and Organised Crime: An EU-wide study' (Institute for Advanced Legal Studies, 2000) quoted in K. Drew, 'Cracking down on Corrupt Companies. A Critical Analysis of the EC's Public Procurement Proposals' (2001) PSIRU <<http://www.againstcorruption.org/reports/2001-09-Corr-EUproc.doc>> accessed 15 December 2007.

¹⁵ 'Public procurement: The Commission reacts to Greek legislation excluding certain companies from public procurement' *Press Release* IP/07/353 (21 March 2007)

¹⁶ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989 and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 076, 23.3. 1992.

¹⁷ Article 1(3) of the Directive 89/665/EEC and Directive 92/13/EEC.

¹⁸ Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts' COM(2006) 195 final/2, 14.6.2006.

decision and to assess whether it is appropriate to initiate a review procedure.¹⁹ This would give the contracting authorities additional time to learn about the existence of corrupt practices. The proposed Directive would allow national courts to render the illegally awarded public contracts ineffective²⁰, as under the current system these contracts cannot be opened again and operators, whose rights have been infringed, may only seek review for damages.²¹

The Public Procurement Directives do not govern the public contracts financed from the EU budget, which are regulated by the Financial Regulation.²² Corruption, subject to a final judgement and grave professional misconduct proven by any means which the contracting authority can justify, constitutes grounds for exclusion from public contracts involving EU funds.²³ When subcontracting is envisaged, there is also a duty to certify that the subcontractor is not in one of the above situations.²⁴ A contract shall also not be awarded to candidates or tenderers, when conflict of interests prevents him from giving priority to the interests of the contracting authority.²⁵

Most importantly, the Commission set up and operates a central database with details of candidates and tenderers who should be excluded from public contracts on the basis of the above criteria.²⁶ The authorities of Member States have access to the information contained in the database and may take it into account when awarding contracts associated with the implementation of the EU budget. Transparency International, in its assessment of the blacklisting system at the EU level, argued that a

¹⁹ 'Public procurement: Commission welcomes European Parliament agreement on Directive improving rights of rejected bidders' *Press Release* IP/07/861 (21 June 2007).

²⁰ Commission (n 18), at 20.

²¹ *Ibid*, at 2.

²² Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 390, 30.12.2006.

²³ Article 93 (c) and (e) of the Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, 16.9.2002.

²⁴ Article 93 of the Regulation No 1995/2006.

²⁵ Article 94 (a) of the Regulation No 1995/2006.

²⁶ Article 95 of the Regulation No 1995/2006.

similar central registry should be established under the Public Procurement Directives for contracts with no EU funds at stake.²⁷

The Community *acquis* also contains measures on accounting and auditing that greatly contribute to prevention and detection of corruption cases. The inclusion of accounting and auditing standards in the anti-corruption strategy is not a new theme and, as observed in Chapter One, has been reflected in other international initiatives, such as the OECD Convention and the UNCAC. Under Community law, publicly traded companies, including banks and insurance companies, are required to prepare their consolidated accounts in accordance with globally accepted International Accounting Standards²⁸ from 2005 onwards.²⁹ The EU has also been promoting the use of high quality auditing standards across the EU by harmonisation of statutory audit requirements in accordance with the International Standards on Auditing.³⁰ As a result of the Community initiatives in this area, companies must comply with high uniform standards that ensure transparency of accounts across the EU.

1.2. The third pillar measures

The provisions of Title VI of the EU Treaty on police and judicial cooperation in criminal matters give the EU competence to fight corruption through approximations of criminal laws of Member States and by establishing close cooperation between judicial and police authorities. This section starts by examining the scope of approximation at the EU level in the area of both public and private sector corruption. Next, the section

²⁷ Transparency International, 'Recommendations for the Development and Implementation of an effective Debarment System in the EU' (2006)
<http://www.eib.org/cms/htm/en/eib.org/attachments/strategies/TI_EU_debarment_recommendations.pdf> accessed 15 December 2007.

²⁸ For text of the International Accounting Standards, see: Annex to Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, OJ L 261/1, 13.10.2003.

²⁹ Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, OJ L 243, 11.9.2002.

³⁰ Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, OJ L 157, 9.6.2006.

moves on to discuss how corruption has found its place in the general framework of police and judicial cooperation within the EU and recently became a subject of an intensified judicial cooperation on the basis of mutual recognition.

1.2.1. Approximation of criminal laws

1.2.1.1. Public sector

In the First Communication on the EU policy against corruption in 1997, the Commission identified a number of shortcomings in the anti-corruption laws of Member States with regard to the scope of regulation and liability of legal persons.³¹ This section discusses how the EU legislator has responded to these loopholes since then and what changes have been introduced to the national criminal laws of the Member States. As discussed in Chapter Two, two EU instruments adopted in the mid 1990s, the First Protocol³² adopted in 1996 and the Anti-Corruption Convention³³ adopted in 1997, address corruption in the public sector, defined as corruption involving public officials.

Both instruments contain the same definitions of active and passive corruption with the exception that the First Protocol is limited to corruption affecting EC financial interests. On the basis of these two instruments, Member States are required to criminalise the offence of passive and active corruption. The Anti-Corruption Convention defines 'passive corruption' as:

³¹ Commission (EC), 'Communication from the Commission to the Council and the European Parliament on a Union Policy Against Corruption', COM(97) 192 final, 21.5.1997, at 3.

³² Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, (adopted 27 September 1996, entered into force 17 October 2002 among the 15 old Member States) (the First Protocol) OJ C 313/10, 23/10/1996.

³³ Convention drawn up on the basis of Article K.3 (2) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, (the Anti-Corruption Convention), OJ C 195, 25.06.1997.

...the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties...³⁴;

and 'active corruption', as:

...the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties...³⁵

The definition of bribery embraced by the EU instruments is quite broad. Both direct and indirect (through intermediary) means of bribery are covered. In the case of passive corruption, the request in itself is the core of the offence, and it is immaterial whether such a request is acted upon.³⁶ The offence is also complete if an official accepts or receives a bribe, even though he later waives the performance of the agreement or returns whatever it is he received.³⁷ Cases in which an official requests a gift or another advantage not for himself but for a third party, such as a spouse or a political party, are also covered by the definition.³⁸ The concept of 'advantage of any kind whatsoever' is deliberately broad to include not only material objects, such as money, but also anything that might represent an indirect interest, for instance settlement of the corrupted person's debts or work on property belonging to him.³⁹ The request or acceptance must predate the official's act or omission. In addition, the situations where the official, contrary to his official duty to act impartially, receives the advantage in return for acting in accordance with his function (e.g. by accelerating the processing of case) are also covered by the EU legislator.⁴⁰

³⁴ Article 2 of the Anti-Corruption Convention

³⁵ Article 3 of the Anti-Corruption Convention

³⁶ Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 391, 15.12.1998.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

The Member States are required to ensure that passive and active corruption, and participating and instigating of it, is criminalised under their national laws and punished by effective, proportionate and dissuasive criminal penalties involving deprivation of liberty which can give rise to extradition.⁴¹ The term 'dissuasive' can be viewed as vague, however, '...multilateral agreements cannot influence domestic legislation too deeply thus allowing them to fix the sanctions themselves, according to the principle of sovereignty.'⁴² The same language is used in other international instruments, including in the Council of Europe and the UN conventions.⁴³

The EU's definitions of bribery do not differ substantially from the definitions adopted by the UNCAC⁴⁴ or the Criminal Law Convention.⁴⁵ However, the international instruments go much further in defining corruption. While the EU instruments limit the offence to bribery, the UNCAC obliges state parties to criminalise not just bribery but a wide range of acts, including embezzlement of public funds by public officials, trading in influence or abuse of functions.⁴⁶ In the Council of Europe Criminal Law Convention, most offences are limited to bribery as well, but trading in influence is also covered.⁴⁷

Before adoption of the EU instruments in this area, criminal laws of Member States already outlawed the bribery of national public officials.⁴⁸ However, the criminal laws of most Member States did not extend to the criminalisation of the corruption of officials of other Member States.⁴⁹ In 1998, a study conducted for the EP identified that no attempt was made in the legislation of any Member State to include specifically

⁴¹ Article 5 of the Anti-Corruption Convention.

⁴² L. Ferola, 'The action of the European Union against corruption' (1999) *Legal Issues of European Integration*, Vol. 26 No. 1/2, 123-156, at 139.

⁴³ For example: Article 19 of the Criminal Law Convention and Article 12 the UNCAC.

⁴⁴ Articles 15 and 16 of the UNCAC.

⁴⁵ Articles 2 and 3 of the Criminal Law Convention. In fact the Council of Europe's convention draw inspiration from the First Protocol in defining bribery, see: Explanatory Report <<http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm>> accessed 16 December 2007.

⁴⁶ Chapter III of the UNCAC.

⁴⁷ Articles 2-12 of the Criminal Law Convention.

⁴⁸ Commission (n 31), at 2.

⁴⁹ Explanatory Report (n 36).

bribery of Community officials, although in many cases the law could be interpreted to include them.⁵⁰ Thus the importance of the EU measures stems mainly from the fact that they obliged the Member States to criminalise passive and active corruption of officials of the Community and other Member States.

In defining the concept of 'national' official, the national criminal laws of Member States are given priority.⁵¹ Where an official of another Member State is involved, the definition in the law of that Member State should normally be applied by the prosecuting Member State. Unlike in the cases of the Council of Europe, the UN and the OECD conventions, the concept of 'national' official does not automatically include members of parliament, ministers, members of the highest courts or courts of auditors in the Member States. These categories of officials may be subject to different anti-corruption regimes across Member States.⁵²

The 'Community' official refers to any employee within the meaning of the Staff Regulations, various categories of staff engaged on contract and seconded national experts to the EC.⁵³ It is worth noticing that members of the Commission, the EP, the Court of Justice and the Court of Auditors are not covered by this definition. These categories of Community officials are assimilated to the equivalent category of national officials, which includes respectively Government Ministers, elected members of its parliamentary chambers, the members of its highest courts or the members of its court of auditors.⁵⁴ The principle of assimilation was introduced due to the high political sensitivity regarding the liability of the highest officials. It is also worth pointing out that the EU instruments do not address the corruption of third country officials, even where such acts adversely affect the EC financial interests.

⁵⁰ European Parliament (n 4), at 3.

⁵¹ Article 1 of the Anti-Corruption Convention.

⁵² Explanatory Report (n 36).

⁵³ Article 1 of the Anti-Corruption Convention.

⁵⁴ Article 4 of the Anti-Corruption Convention.

The growing economic importance of legal persons has raised the question of their liability for corruption. The scope and character of such liability depends to a large extent on the legal tradition of the individual Member States. In some Member States, if a bribe was paid on behalf of a company, then the company itself might have been criminally liable, while in other Member States the company would have no liability, only the natural person involved would have committed an offence even if it was for the benefit of the company.⁵⁵ This led to a situation where a penalty was imposed on an individual and a company could simply replace this person with someone else. In light of the greater complexity of structures within an organisation, it also becomes increasingly difficult to identify a natural person who may be held responsible for a bribery offence.⁵⁶

The First Protocol and the Anti-Corruption Convention do not regulate the liability of legal persons. As commented in Chapter Two, they only require the Member States to introduce criminal liability of the heads of business. The Member States agreed on rules concerning the liability of legal persons in the Second Protocol⁵⁷ to the PIF Convention adopted in 1997, which became standard EU rules regulating the liability of legal persons.⁵⁸ The Second Protocol defines a legal person as ‘any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations.’⁵⁹ Pursuant to its provisions, Member States are obliged to take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by persons with ‘leading positions within the legal persons’, as defined by the Second Protocol, and by a subordinate employee, in a case where the offence has been made possible by the lack of supervision or control by one of the

⁵⁵ Commission (n 31), at 3.

⁵⁶ Council of Europe, Explanatory Report to the Criminal Law Convention, available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm> last accessed 20 October 2007.

⁵⁷ Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities’ financial interests (adopted 19 June 1997, not entered into force) (the Second Protocol) OJ C 221/22, 19.07.1997.

⁵⁸ S. Peers, *EU Justice and Home Affairs Law* (2nd edn OUP, 2006), at 411.

⁵⁹ Article 1 (d) of the Second Protocol.

persons in leading position.⁶⁰ In addition, the liability of a legal person does not exclude the criminal liability of a natural person involved in the commission of the offences for which the legal person is liable.⁶¹

The Member States are obliged to introduce effective, proportionate and dissuasive sanctions, which shall include criminal or non criminal fines or other sanctions.⁶² The introduction of criminal liability is not required, administrative and civil law measures are possible as well.⁶³ This provision is a compromise among different legal systems of Member States. Some jurisdictions do not accept criminal liability of legal persons, as they recognise that ‘...corporations ought not to be subject to the criminal law because they cannot have mental states and so cannot be “guilty.”’⁶⁴ Similar, the OECD, the Council of Europe and the UN initiatives in this area also do not introduce any obligation to establish criminal law liability of legal persons.⁶⁵ It is important to point out that the EU was the first international organisation to address the liability of legal persons in Europe.

The Second Protocol, however, is limited to acts of corruption affecting the EC financial interests. The liability of legal persons in a situation where a person within the company gives a bribe to a national official to obtain a benefit for that company without affecting the EC financial interests is not regulated by the Second Protocol or any subsequent EU measure. A second serious limitation is the fact that it foresees the liability of legal persons for active corruption of public officials only and does not address the problem of passive corruption of legal persons. This shortcoming was

⁶⁰ Article 3 (1) and (2) of the Second Protocol.

⁶¹ Article 3(3) of the Second Protocol.

⁶² Article 4 of the Second Protocol.

⁶³ Explanatory Report on the Second Protocol to the Convention on the protection of the European Communities’ financial interests, OJ C 91, 31.3.1999.

⁶⁴ S. Rose-Ackerman, ‘Corruption and the criminal law’ (2002) *Forum on Crime and Society*, Vol. 2 No. 1, 3-21, at 12.

⁶⁵ Article 3(2) of the OECD Convention, Article 19(2) of the Criminal Law Convention and Article 26 of the UNCAC.

addressed by the EU legislator later through the adoption of measures against corruption in the private sector.

The EU measures in the area of public sector corruption have a strong criminal law character. They do not define any standards for the prevention of corruption within the public administrations of Member States. Criminal law regulation is important. As it has been pointed out:

without investigation and prosecution, corruption may not become visible and societies may perceive themselves to be free of corruption... law enforcement has an important preventive effect: it may even be considered a prerequisite for prevention, in that it points at specific corruption problems, thus helping create the necessary awareness. Successful law enforcement can generate a momentum and mobilise society against corruption. Without the prosecution of high-level corruption, the chances of success of specific prevention measures may be fairly slim.⁶⁶

However, a successful anti-corruption strategy cannot be narrowed down to the criminal law alone. As Rose-Ackerman has pointed out, corruption cannot be fought solely through criminal law, which can only ‘...play a role as a backstop lying behind the needed structural changes.’⁶⁷ As already observed in Chapter One, initiatives of the UN and the Council of Europe increasingly embrace preventive measures against the corruption of public officials, such as ensuring transparency in financing, prevention of conflicts of interests or introduction of codes of conduct for public officials.

Although there are no formal EU measures regulating the prevention of corruption, an important part of EU policy involves supporting various informal initiatives of Member States aimed at raising integrity in public institutions. An example of such an initiative is the European Public Administration Network (EUPAN), which is an informal network of Directors-General responsible for public administrations in the

⁶⁶ Council of Europe, ‘The Prevention of Corruption in Central and Eastern Europe’ (2002) Octopus Activity Report, at 4 <[http://www.coe.int/t/e/legal_affairs/legal_co-operation/combating_economic_crime/3_technical_cooperation/OCTOPUS/2001/Octopus\(2002\)1E.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/combating_economic_crime/3_technical_cooperation/OCTOPUS/2001/Octopus(2002)1E.pdf)> accessed 16 December 2007.

⁶⁷ S. Rose-Ackerman (n 64), at 3.

Member States.⁶⁸ EUPAN provides a forum for learning and exchange of best practices with the goal of raising integrity, accountability and transparency in public administration among Member States.

1.2.1.2. Private sector

As discussed in Chapter Two, the EU recognised that it had a vital interest in combating private sector corruption because of its negative impact on competition in relation to the purchase of goods or services within the internal market. In December 1998 the EU adopted the Joint Action⁶⁹ on combating corruption in the private sector, which predated other international initiatives in this area. The Joint Action called the Member States to make active and passive corruption in the private sector a criminal offence punishable by effective, proportionate and dissuasive penalties.⁷⁰ In 2003 the Joint Action was replaced by a Framework Decision on combating corruption in the private sector⁷¹ with a more binding force and a deadline for implementation of 22 July 2005. The Framework Decision uses similar definitions of active and passive corruption as the Joint Action. It defined ‘active corruption’ in the private sector as:

promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person’s duties⁷²;

and ‘passive corruption’, as:

directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party,

⁶⁸ For more information, see: <www.eupan.org> accessed 16 December 2007.

⁶⁹ Council Joint Action 98/742/JHA of 22 December 1998 on corruption in the private sector, OJ L 358/2, 31.12.1998.

⁷⁰ Article 4 of the Joint Action.

⁷¹ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, (the Framework Decision), OJ L 192/54, 31.7.2003.

⁷² Article 2 (a) of the Framework Decision.

while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties.⁷³

The Framework Decision does not define the 'breach of duty'. This concept is understood in accordance with national law, providing that national law covers as a minimum any disloyal behaviour constituting a breach of a statutory duty or professional regulations or instructions within the relevant business.⁷⁴ Apart from the fact that the above definitions concern private entities, their scope is exactly the same as in case of public sector definitions introduced by the Anti-Corruption Convention.

The Framework Decision goes further than the Joint Action in several other areas. First, it applies to business activities within profit and non-profit entities.⁷⁵ Second, it extends the list of offences to participatory acts, such as instigation, aiding and abetting⁷⁶, and encourages Member States to provide for a temporary prohibition of a person who had a leading position in a company, following their conviction for corruption, from engaging in a similar business activity or holding such a position.⁷⁷ Finally, the Framework Decision introduces the liability of legal persons for both active and passive corruption committed for their benefit.⁷⁸

The Joint Action allowed Member States to limit the criminalization to a 'conduct which involves, or could involve, the distortion of competition, as a minimum within the common market, and which results, or might result, in economic damage to others by the improper award or improper execution of a contract.'⁷⁹ The Framework Decision allows for limiting the incrimination only to 'conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial

⁷³ Article 2 (b) of the Framework Decision.

⁷⁴ Article 1 of the Framework Decision.

⁷⁵ Article 2(2) of the Framework Decision.

⁷⁶ Article 3 of the Framework Decision.

⁷⁷ Article 4(3) the Framework Decision.

⁷⁸ Article 5 of the Framework Decision.

⁷⁹ Articles 2(2) and 3(2) of the Joint Action.

services.’⁸⁰, therefore the scope of the obligatory criminalization is broader. Three Member States- Germany, Italy and Poland- lodged declarations to limit criminalisation in such a way.⁸¹ The fact that the EU legislator introduced the possibility to limit criminalisation to conduct distorting competition shows that this anti-corruption measure serves the broader objective of ensuring fair competition and proper functioning of the internal market.

Although the EU was the first international organisation to address corruption in the private sector, its initiatives remain very limited and lag behind the latest international standards in this area. For comparison, the UNCAC not only criminalise bribery in the private sector but also recommends that state parties prevent corruption in the private sector, *inter alia*, by enhancing auditing and accounting standards, promoting the development of codes of conduct, using good commercial practices and preventing conflicts of interests by imposing restrictions on the employment of public officials by the private sector.⁸² Evidence also suggests that anti-corruption efforts can make a positive impact, as a 2007 report on economic crime in the private sector found that companies which had implemented effective anti-corruption controls in conjunction with strong, clearly understood ethical guidelines said they suffered fewer incidents of corruption than other companies.⁸³

The EU regulates some areas that contribute to prevention of corruption within the private sector, including public procurement, liability of heads of business and legal persons, which may encourage companies to reinforce their internal control systems. The EU should, however, embrace promotion of integrity and ethical standards into its

⁸⁰ Article 2(3) of the Framework Decision.

⁸¹ Commission (EC), ‘Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector’ COM(2007) 328 final, 18.6.2007, at 7.

⁸² Article 12 of the UNCAC.

⁸³ PriceWaterhouseCoopers, ‘Economic Crime: people, culture and controls. The 4th biennial Global Economic Crime Survey’ (2007), at 33
<[http://www.pwc.com/extweb/pwcpublications.nsf/docid/1E0890149345149E8525737000705AF1/\\$file/PwC_2007GECS.pdf](http://www.pwc.com/extweb/pwcpublications.nsf/docid/1E0890149345149E8525737000705AF1/$file/PwC_2007GECS.pdf)> accessed 16 December 2007.

strategy against corruption in the private sector. This would not only complement the activities of national governments in this area, but would also signal the commitment of the EU to fair competition within the internal market. The only initiative of this type, which has the support of the Commission, is the Charter of the European Professional Associations⁸⁴, whose signatories include notaries, lawyers, accountants, auditors and tax consultants. This Charter encourages their member associations to adopt standards or guidelines within existing or future codes of conduct to protect the professionals they represent from being involved in fraud, corruption and money-laundering or from being exploited by organised crime.

1.2.2. Cooperation between police and judicial authorities and the treatment of corruption

The investigation and prosecution of cross-border crime, including cross-border corruption, is difficult due to differences in laws, practices and procedures among countries. Therefore, there is a need for a police and judicial cooperation among national authorities to ensure that cross-border crimes are dealt with more efficiently. International cooperation in criminal matters is organised by a variety of legal instruments agreed either on a bilateral basis or within the framework of international organisations such as the EU, the UN or the Council of Europe.

As observed in Chapter One, traditional judicial cooperation, including extradition, transfer of proceedings and mutual legal assistance, is conducted in accordance with the principle of ‘double criminality’. A second principle of traditional judicial cooperation is that the requesting state must comply with the procedural requirements of the requested state. It requires detailed knowledge of procedures in the requested state under which legal assistance may be requested.

⁸⁴ Charter of the European Professional Associations in supporting the fight against organised crime, (27 July 1999)
<[http://www.bnotk.de/Berufsrecht/Europ.Chartag.org.Kriminalitaet/Europaeische_Charta_OrgKrim\(EN\).html](http://www.bnotk.de/Berufsrecht/Europ.Chartag.org.Kriminalitaet/Europaeische_Charta_OrgKrim(EN).html)> accessed 16 December 2007.

At the EU level, the need for an effective judicial and police cooperation has been particularly strong. The progressive elimination of border controls has considerably facilitated the free movement of persons, but this has also made it easier for criminals to operate transnationally. Long before the EU gained competence in this area, the foundations for mutual legal assistance in Europe were laid down by the conventions of the Council of Europe, which governed the relations among Member States in this area.⁸⁵ Two of these conventions were particularly important for combating cross-border crime: the 1957 European Convention on Extradition⁸⁶ and the 1959 Convention on Mutual Assistance in Criminal Matters⁸⁷, which all Member States have ratified.

As discussed in Chapter Two, the EU gained powers to regulate the field of police and judicial cooperation in criminal matters with the entry into force of the Treaty of Maastricht in 1993. Since then the Member States have agreed several conventions with the goal of further developing the Council of Europe's instruments and speeding up mutual assistance. Examples include two EU conventions on extradition: the Convention on simplified extradition procedure signed in 1995⁸⁸ and the Convention relating to extradition between the Member States of the EU signed in 1996.⁸⁹ These conventions have the task of supplementing and facilitating the application of the European Extradition Convention signed in 1957. However, due to the lack of ratifications by

⁸⁵ For an overview of the Council of Europe conventions in the area of legal cooperation in criminal matters and chart of ratifications of by Member States, see:
<<http://conventions.coe.int/Treaty/Commun/ListeParGroupe.asp?GR=1&MA=20&CM=15&CL=ENG>> accessed 16 December 2007.

⁸⁶ Council of Europe, European Convention on Extradition, ETS No.: 024 (adopted 13 December 1957, entered into force 18 April 1960) <<http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>> accessed 16 December 2007.

⁸⁷ Council of Europe, European Convention on Mutual Assistance in Criminal Matters, ETS No.: 030 (adopted 20 April 1959, entered into force 12 June 1962)
<<http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>> accessed 16 December 2007.

⁸⁸ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union, (adopted 10 March 1995, not entered into force), OJ C 78/2, 30.03.1995.

⁸⁹ Convention drawn up on the basis of Article K.3 of the Treaty on European Union relating to Extradition between the Member States of the European Union, (adopted 27 September 1996, not entered into force), OJ C 313/12, 23.10.1996.

Member States, as of 16 December 2007, none of these conventions has entered into force.

In 2000, the Council also agreed a Convention on mutual assistance in criminal matters⁹⁰, which simplified and modernized traditional mutual assistance. On the basis of this convention, the Member States requesting mutual assistance no longer need to satisfy procedural requirements in the requested state. Instead, the priority is given to the methods and procedure indicated by the Member State that requires the assistance.⁹¹ As of 16 December 2007, this convention has not been ratified by all Member States.⁹²

Due to delays in ratifications, the EU instruments have not been very successful, and the system of traditional judicial cooperation developed under the framework of the Treaty of Maastricht with the use of conventions has turned out to be ineffective. The Commission regarded this system as both too slow and cumbersome for the needs of the EU.⁹³ There was a need for reinforcement of integration in criminal law matters. In 1998, the UK government, during its presidency in the Council, proposed a new wave of judicial cooperation based on mutual recognition of pre-trial orders and judgements in criminal matters, a 'third way' that could be accepted by those Member States who were enthusiastic about harmonisation of criminal justice systems as well as those protective of national standards.⁹⁴ The UK claimed that this approach is based on:

tolerance of diversity on the basis of mutual confidence and trust in each others' legal systems, as opposed to insistence of uniformity for its own sake.⁹⁵

⁹⁰ Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, (adopted 29 May 2000, not entered into force), (the Mutual Assistance Convention) OJ C 197, 12.07.2000.

⁹¹ Article 4(1) of the Mutual Assistance Convention.

⁹² It has not been ratified by Greece, Italy, Ireland, Luxembourg, Malta
<<http://www.consilium.europa.eu/agreements>> accessed 16 December 2007.

⁹³ Commission (EC), 'Communication from Commission to the Council and the European Parliament. Mutual Recognition of Final Decisions in Criminal Matters' COM(2000)495final, 26.7.2000, at 2.

⁹⁴ Federal Trust, 'Criminal Law, Procedures and Competences' (2006), at 2
<<http://www.fedtrust.co.uk/admin/uploads/FedTrust%20JHA%203.pdf>> accessed 16 December 2007.

⁹⁵ 'The mutual recognition of criminal judgements in the EU: will the free movement of prosecutions create barriers to genuine criminal justice?' *Statewatch News Online* (2000)
<<http://www.statewatch.org/news/jun00/05mutual.htm>> accessed 16 December 2007.

Mutual recognition was not a new concept. It had already worked in the operation of the internal market. In 1999 the Tampere European Council agreed that mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in criminal matters within the EU.⁹⁶ This was subsequently reiterated in 2004 in a five-year programme for EU action in justice and home affairs, the so-called Hague Programme,⁹⁷ and most importantly in the Treaty of Lisbon.⁹⁸

The principle of mutual recognition in criminal matters is very different from the traditional principle of cooperation between states. It is no longer necessary to satisfy the legal and procedural requirements of other Member States. Mutual recognition means that ‘...once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure -in so far as it has extranational implications - would automatically be accepted in all other Member States, and have the same or at least similar effects there.’⁹⁹ The core obligation is to recognize and execute the order or judgment of another Member State, subject only to the reasons for non-recognition or non-execution or for suspension of execution prescribed by the EU legislator. Under the rules of mutual recognition, the pre-trial orders and judgments of one Member State are recognised and accepted by all other Member States, even though their laws may not regulate a certain matter in the same or even a similar manner. It also means that each Member State is ‘...effectively accepting the criminal laws of all other Member States of the EU without a clear picture of what those laws might be.’¹⁰⁰ As the Commission and the Council pointed out:

⁹⁶ Tampere European Council, Presidency Conclusions, (15 and 16 October 1999), para 33.

⁹⁷ Council of the European Union, ‘The Hague Programme: strengthening freedom, security and justice in the European Union’ 16054/04, 13.12.2004.

⁹⁸ Article 69A of the Treaty of Lisbon.

⁹⁹ Commission (n 93).

¹⁰⁰ S. Alegre and M. Leaf, ‘Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study-the European Arrest Warrant’ (2004) *European Law Journal*, Vol. 10 No. 2, 200-217, at 208.

implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.¹⁰¹

While a comprehensive analysis of the measures implementing the principle of mutual recognition in criminal matters lies beyond the scope of this thesis, the significance of these measures for prosecution of cross-border corruption must be emphasised. The Framework Decision on the European Arrest Warrant (EAW)¹⁰², which entered into force in January 2004, is the first measure in this area. It was adopted in response to the lack of ratification of the EU conventions on extradition. As Gilmore observed, it was also a move towards the removal of the three most controversial and difficult issues in the extradition process: non-extradition of nationals, the political offence exception and the requirement of double criminality.¹⁰³

The EAW Framework Decision introduced a new, simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences. An arrest warrant issued in one Member State is executed in another Member State with the minimum of formality and removes the complexity and potential for delay inherent in the extradition procedures. The EAW is sent directly from one judicial authority to another without the involvement of any diplomatic channel or other intermediary. The execution of these warrants is simply a judicial process and the political stage in current extradition procedures, where a government minister takes the final decision on whether or not to extradite someone, is abolished. The EAW may be issued for any act punishable in the Member State issuing the arrest warrant for a

¹⁰¹ 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters', OJ C 12/10, 15.1.2001, at 10.

¹⁰² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, (the EAW Framework Decision), OJ L 190/1, 18.7.2002.

¹⁰³ B. Gilmore, 'The EU Framework Decision on the European Arrest Warrant: An overview from the Perspective of International Criminal Law' (2002) ERA Forum 3, 144-147, at 145.

maximum period of at least twelve months or, where a sentence has already been passed, for at least four months.¹⁰⁴

The best-known provision of the Framework Decision on the arrest warrant is the abolition of the principle of double criminality for certain crimes.¹⁰⁵ It is sufficient that the act is criminal in the state issuing the EAW. There is no need to verify the double criminality if the EAW has been issued for one of the thirty-two listed offences as defined by the law of the issuing Member State, where such an offence could be subject to a sentence of a maximum period of at least three years. Corruption is one of the offences where the requirement of double criminality is abolished.

The mechanism of the EAW is based on a high level of confidence between Member States. Traditional legal assistance required a certain extent of harmonization of substantive law to fulfil the requirement of double criminality. Under the mutual recognition system, differences in the definition of corruption do not constitute an obstacle to cooperation. The offence is defined by the law of the issuing state, thus it embraces, next to cross-border corruption, cases of purely domestic corruption. In practice, however, the definitions of corruption in public and private sectors are now approximated by the EU legislator in the Anti-Corruption Convention and the Framework Decision on corruption in the private sector. Providing that these measures are effectively implemented by all Member States, there should be no major controversy in applying the EAW in corruption cases.

As Peers has pointed out, the contours of the agreement on the EAW formed the template for agreement on other proposals.¹⁰⁶ The legal measures based on the mutual recognition, adopted so far, all abolish the double criminality for exactly the same list of crimes as that applicable to the EAW. The judicial cooperation in criminal matters at the

¹⁰⁴ Article 2(1) of the EAW Framework Decision.

¹⁰⁵ Article 2(2) of the EAW Framework Decision.

¹⁰⁶ S. Peers, 'Mutual recognition and criminal law in the European Union: has the Council got it wrong?' (2004) *Common Market Law Review*, Vol. 41 Issue 1, 5-36, at 12.

EU level has been intensified in the area of thirty-two crimes, and corruption is one of them. The new legal instruments based on mutual recognition are all designed to embrace corruption.¹⁰⁷ The measures relating to the execution of freezing and confiscation orders in relation to the proceeds of corruption are here of particular importance. Next to traditional prosecution focusing on the treatment of individuals, the proceed-oriented measures constitute an important element of crime control strategies.¹⁰⁸ Corruption is a crime committed for profit and measures focused on the seizure or confiscation of that profit are an effective deterrent against corruption and reduce the incentives for offending. Freezing bank accounts and seizure of property prevent criminals from taking advantage of the proceeds of their illegal activities.

In addition to the above legislative measures, the EU also developed institutions facilitating judicial and police cooperation in cases of cross-border corruption. Police cooperation within the EU is reinforced by the European Police Office (Europol), which was established by a convention signed in 1995.¹⁰⁹ Europol is the agency responsible for improving the effectiveness of cooperation between Member States in combating serious organised and cross-border crimes, which require a common approach due to their scale, significance and consequences.¹¹⁰ To this end, Europol's tasks include facilitating the exchange of information between Member States; obtaining, collating and analysing information and intelligence; notifying the Member States of any information

¹⁰⁷ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L196, 2.8.2003; Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22.3.2005; Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006; Council of the European Union, 'Proposal for a Council Framework Decision on the European Evidence Warrant (EEW) for obtaining objects, documents and data for use in proceedings in criminal matters' 9913/07, 25.5.2007.

¹⁰⁸ M. Kilchling, 'Tracing, Seizing and Confiscating Proceeds from Corruption (and other Illegal Conduct) Within or Outside the Criminal Justice System' (2001) *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 9/4, 264-280, at 264.

¹⁰⁹ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the establishment of a European Police Office, (adopted 26 July 1995, entered into force 1 October 1998), (the Europol Convention), OJ C 316/2, 27.11.1995.

¹¹⁰ Article 2 of the Europol Convention.

concerning them and of any connections identified between criminal offences; and maintaining a computerised system of information.¹¹¹

Over time Europol also gained competence to participate in a support capacity in joint investigation teams¹¹² and ask competent authorities of Member States to conduct or coordinate investigations.¹¹³ Initially, Europol was not competent to deal with the offence of corruption.¹¹⁴ Europol competences were extended to cover corruption in 2001 by a Council Decision¹¹⁵, and since 2000 they also cover the offence of money-laundering in general, regardless of the type of offence from which the laundered proceeds originated, thus including corruption.¹¹⁶ In addition, Europol produces Organised Crime Threat Assessments reports, which give a future-oriented assessment of trends in organised crime within the EU.¹¹⁷ In these reports, Europol also examines links between corruption and organised criminal groups.

One of the bodies with the aim of enhancing judicial cooperation in criminal matters is the European Judicial Network (EJN)¹¹⁸, which was set up in 1998. It consists of contact points within each Member State and the Commission. The EJN helps national judges and prosecutors to carry out cross-border investigations by enabling

¹¹¹ Article 3 of the Europol Convention.

¹¹² Article 13 of the Mutual Assistance Convention provides that two or more Member States may set up a joint investigation team for a specific purpose and a limited period to carry out criminal investigations in one or more of the Member States setting up the team.

¹¹³ Council Act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ C 312/1, 16.12.2002.

¹¹⁴ Corruption was one of the offences listed in the Annex to the Europol Convention, which the Council acting unanimously could assign Europol to deal with it.

¹¹⁵ Council Decision of 6 December 2001 extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, OJ C 362, 18.12.2001.

¹¹⁶ Protocol drawn up on the basis of Article 43(1) of the Convention on the establishment of a European Police Office (Europol Convention) amending Article 2 and the Annex to that Convention, OJ C 358, 13.12.2000.

¹¹⁷ Europol, 'EU Organised Crime Threat Assessment 2007'

<[http://www.europol.europa.eu/publications/European_Organised_Crime_Threat_Assessment_\(OCTA\)/OCTA2007.pdf](http://www.europol.europa.eu/publications/European_Organised_Crime_Threat_Assessment_(OCTA)/OCTA2007.pdf)> accessed 17 December 2007.

¹¹⁸ Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network, (98/428/JHA), OJ L 191, 7.7.1998

them to be in direct contact with judicial authorities in other Member States. The EJM facilitates access to the legal information necessary to prepare effective requests for judicial cooperation in another Member State.

The main judicial body in this area is, however, Eurojust, a cooperation network established in 2002 to assist the authorities within Member States and coordinate investigations and prosecution of serious cross-border and organised crime.¹¹⁹ The College of Eurojust is composed of twenty-seven national members, one nominated by each Member State, who may be a judge, prosecutor or police officer.¹²⁰ Eurojust competence corresponds to the offences in respect of which Europol is competent, and thus covers cases of transnational corruption.¹²¹ Eurojust activities aim at improving cooperation among the relevant authorities of Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests.¹²² During 2006, for example, Eurojust asked the authorities in Portugal to undertake an investigation into money-laundering and corruption, and to coordinate this investigation with the prosecution authorities in Belgium.¹²³

The Treaty of Lisbon provides for a possibility to increase the powers of Eurojust. It provides that Eurojust tasks may include the initiation of criminal investigations, particularly those relating to offences against the financial interests of the Union.¹²⁴ This goes further than the decision on setting up Eurojust, which provides that Eurojust may only ask the national authorities to consider undertaking an investigation.¹²⁵ However, as White has noted, it is not clear at this stage how Eurojust

¹¹⁹ Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA), (the Eurojust Decision), OJ L 63/1, 6.3.2002.

¹²⁰ Article 2(1) of the Eurojust Decision.

¹²¹ Article 4 of the Eurojust Decision.

¹²² Article 3 of the Eurojust Decision.

¹²³ Eurojust, 'Annual Report' (2006)

<http://www.eurojust.europa.eu/press_releases/annual_reports/2006/Annual_Report_2006_EN.pdf> accessed 16 December 2007.

¹²⁴ Article 69D of the Treaty of Lisbon.

¹²⁵ Article 6 (a)(i) of the Eurojust Decision.

could initiate proceedings in the Member States.¹²⁶ This could involve either requesting a Member State to open a case through a non-binding but formal request; or it could be done by virtue of special powers yet to be determined.¹²⁷ In 2007 the Commission recognised that Eurojust should have wider powers, especially in initiating inquiries in a Member State and criminal inquiries at European level, especially regarding offences affecting the EC financial interests.¹²⁸

In addition, the Treaty of Lisbon foresees the creation of a new institution, the European Public Prosecutor's Office from Eurojust (EPP), in order to combat crimes affecting the financial interests of the Union.¹²⁹ The EPP's Office would be responsible for investigating, prosecuting and bringing to judgment the perpetrators of and accomplices in offences against the Union's financial interests.¹³⁰ The European Council may, however, extend the powers of the EPP's Office to include 'serious crime having a cross-border dimension.'¹³¹ The EPP would exercise the functions of a prosecutor in the national court in relation to these crimes.

According to the Commission, the creation of the EPP would help to overcome the fragmentation of the European criminal law area.¹³² In particular, the centralisation of the investigation and prosecution functions by the EPP would help to overcome the difficulty where evidence gathered in one Member State cannot be used in courts in another Member State.¹³³ In addition, the Commission stressed the added value of

¹²⁶ S. White, 'European Constitution: what is new in the area of judicial co-operation in criminal matters and police cooperation' (2004) The Federal Trust Online Paper 07/04, at 4
<http://www.fedtrust.co.uk/uploads/constitution/07_04.pdf> accessed 16 December 2007.

¹²⁷ Ibid.

¹²⁸ Commission (EC), 'Communication on the role of Eurojust and European Judicial Network in the fight against organised crime and terrorism in the European Union' COM(2007) 644 final, 23.10.2007, at 6.

¹²⁹ Article 69E of the Treaty of Lisbon.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Commission (EC), 'Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor' COM(2001) 715 final, 11.12.2001, at 12.

¹³³ Ibid, at 14.

establishing of the EPP for the investigation of corruption cases within the Community institutions, where it could supplement the administrative action of OLAF.¹³⁴

Some authors, however, contest the desirability of the EPP. As Peers has noted, there is no need for the EPP's Office in light of the intensification of cross-border judicial cooperation among Member States.¹³⁵ It has been also pointed out that the EPP could take advantage of differing standards in the burden of proof, mode of trial, sentencing and admissibility of evidence across the EU, which in turn could result in watering down of procedural safeguards, in particular regarding the admissibility of evidence.¹³⁶

1.3. The anti-corruption dimension of EU anti-money laundering legislation

The fight against money laundering at the EU level is a cross-pillar matter, meaning that it is regulated through legislative measures adopted under both the first and third pillars. Before moving on to discuss the legislative measures in this area, it is important to point out that the EU money laundering initiatives have developed in parallel with international developments in the field, in particular initiatives of the FATF.¹³⁷ While a more detailed analysis of EU anti-money laundering measures is outside the scope of this thesis, here the discussion focuses on the provisions with direct relevance for the prevention of corruption.

¹³⁴ Ibid, at 15.

¹³⁵ Peers (n 58), at 491.

¹³⁶ Justice, 'Justice submission to the House of Commons European Security Committee on the European Convention on the Future of Europe –draft articles on the area of freedom, security and justice' (2003) <<http://www.justice.org.uk/images/pdfs/futureofeuropa.pdf>> accessed 16 December 2007.

¹³⁷ For more, see: V. Mitsilegas and B. Gilmore, 'The EU legislative framework against money laundering and terrorist finance: a critical analysis in the light of evolving global standards' (2007) ICLQ Vol. 56, 119-141.

The EU adopted its first money laundering countermeasure in 1991 with the Directive against money laundering (known as the First Directive)¹³⁸, which obliged Member States to prohibit money laundering. Originally, the Commission proposed that under the First Directive, money laundering should be treated as a criminal offence, but the Council was opposed, ‘...taking the view that the Community had no such competence.’¹³⁹ Nevertheless, in a statement attached to the First Directive, all Member States agreed to enact adequate criminal legislation to make money laundering a criminal offence.¹⁴⁰ The definition of money laundering in the First Directive is derived from the relevant provisions of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which, as already mentioned in Chapter One, limits criminalisation to laundering of the proceeds of drug related offences. However, Member States were allowed to extend the provisions of the First Directive to any other ‘criminal activity’, including corruption.¹⁴¹ In contrast to UN and Council of Europe initiatives in this area, the First Directive embraces the preventive approach to money laundering.¹⁴² As Gilmore has pointed out, the content of the First Directive was heavily influenced by measures elaborated by the FATF.¹⁴³ The First Directive expresses the ‘know your customer’ principle¹⁴⁴, recognising a series of obligations for credit and financial institutions¹⁴⁵, including rules on identification and for keeping records of customers, when opening accounts, and for transactions above a certain threshold or wherever there is suspicion of money laundering.¹⁴⁶ The First Directive also requires credit and financial institutions to inform authorities ‘on their own initiative, of any fact which might be an indication of money laundering.’¹⁴⁷

¹³⁸ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, (the First Directive), OJ L 166, 28/06/1991.

¹³⁹ Mitsilegas and Gilmore (n 137), at 136.

¹⁴⁰ W. C. Gilmore, *Dirty Money: The evolution of international measures to counter money laundering and the financing of terrorism* (3rd edn, Council of Europe Publishing, 2004), at 196.

¹⁴¹ Article 1 of the First Directive.

¹⁴² Gilmore (n 140), at 194.

¹⁴³ *Ibid*, at 195.

¹⁴⁴ *Ibid*, at 199.

¹⁴⁵ The First Directive also applies to branches, when located in the Community, of credit and financial institutions whose head offices are inside or outside the Community, see: Article 1 of the First Directive.

¹⁴⁶ Articles 3-8 of the First Directive.

¹⁴⁷ Article 6 of the First Directive.

In recognition of the need to comply with evolving international standards, in 2001 the Second Directive was adopted.¹⁴⁸ In 1999 the Commission noted that ‘since the Directive was adopted in 1991 both the money laundering threat and the response to that threat have evolved’ and that ‘...the response of the European Union must also move forward.’¹⁴⁹ The Second Directive also drew to a large extent from the 1996 revision of FATF standards.¹⁵⁰

Two important changes relevant for combating corruption were introduced by the Second Directive. First, it extended the requirement to identify customers, keep records and report suspicious transactions for certain non-financial activities and professions, such as tax advisors, external accountants and auditors, real estate agents, notaries, lawyers, auctioneers, and casinos.¹⁵¹ Second, it expressly prohibited the laundering of the proceeds generated from corruption.¹⁵²

It is important to point out that at the EU level, the laundering of funds derived from corruption has been criminalised since 1997, when the Second Protocol was adopted. However, the Second Protocol did not ensure effective criminalisation for a number of reasons. First, it was limited to corruption damaging the EC financial interests. Next, the Second Protocol allowed the Member States to limit the criminalization of money laundering to ‘serious cases’, as defined by their national law, of active and passive corruption.¹⁵³ Moreover, as already commented above, the Second Protocol has not yet entered into force.

Interestingly enough, the Second Directive does not define corruption by reference to the relevant UN or EU instrument. The analysis of the subsequent

¹⁴⁸ Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, (the Second Directive), OJ L 344/76, 28.12.2001.

¹⁴⁹ Quote taken from Gilmore (n 140), at 201.

¹⁵⁰ Directive 2001/97/EC, para 7.

¹⁵¹ Article 2 of the Second Directive.

¹⁵² Article 1(E) of the Second Directive.

¹⁵³ Art. 18 of the Second Protocol.

amendments to the proposal for the Second Directive shows that the definition of corruption was subject to debate in the Council and in the EP. In particular, two possibilities were under consideration: corruption damaging the EC financial interests¹⁵⁴ and corruption as defined in the Anti-Corruption Convention and the OECD Convention.¹⁵⁵ In the final text of the Second Directive, 'corruption' is defined by the law of each Member State.¹⁵⁶ In the Council's view such definition covers all forms of corruption, whether or not it is damaging to the financial interests of the EC, and has been included in such an explicit manner to underline the seriousness of this offence.¹⁵⁷ Allowing national legislators to define what constitutes corruption has a major advantage, as it ensures the broadest possible scope of the offence, offsetting the fact that the EU instruments define corruption in a very limited way. In cases where Member States ratified the relevant anti-corruption instruments of the UN, the Council of Europe and the OECD, the Second Directive would cover cases of corruption as prescribed by all these instruments.

The Third Directive¹⁵⁸ against money laundering, replacing two previous texts in this area, was adopted in 2005. As in the case of the Second Directive, the aim was to bring the Community standards in line with the FATF Forty Recommendations, which were revised in 2003 to cover terrorist financing. Considering the area of anti-corruption policy, there is a need to draw attention to important provisions concerning customer

¹⁵⁴ Commission (EC), 'Proposal for a European Parliament and the Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering' COM(1999) 352 final, 14.7.1999, at 17.

¹⁵⁵ Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering' 7440/00, 4.4.2000, at 5.

¹⁵⁶ Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering', 8614/00, 19 May 2000, at 5.

¹⁵⁷ Council of the European Union, 'Common position with a view to the adoption of a Directive of the European Parliament and of the Council amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering Draft Statement of the Council's reasons' 12469/00, 21.11.2000, at 5.

¹⁵⁸ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, (the Third Directive), OJ L 309/15, 25.11.2005.

identification and due diligence. The Third Directive contains an explicit prohibition of anonymous bank accounts and passbooks.¹⁵⁹ Furthermore, it introduces the liability of legal persons for laundering of the proceeds of corruption¹⁶⁰ and also establishes detailed rules for customer due diligence, including enhanced customer due diligence for politically exposed persons residing in another Member State or in a third country.

The politically exposed persons, by virtue of their position in public life and often as a result of protection guaranteed by immunities, are vulnerable to corruption. According to the Third Directive, “politically exposed persons” means natural persons who are or have been entrusted with prominent public functions and immediate family member, or persons known to be close associates, of such persons.¹⁶¹ This definition was further elaborated by the Commission in 2006.¹⁶² According to the Commission, the category of ‘politically exposed persons’ includes heads of State, heads of government, ministers and deputy or assistant ministers; members of parliaments; members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not subject to further appeal, except in exceptional circumstances; members of courts of auditors or of the boards of central banks; ambassadors, *chargés d'affaires* and high-ranking officers in the armed forces; members of the administrative, management or supervisory bodies of State-owned enterprises.¹⁶³ The Commission document also defines ‘immediate family members’¹⁶⁴ and ‘persons known to be close associates’¹⁶⁵ of politically exposed persons.

¹⁵⁹ Article 6 of the Third Directive.

¹⁶⁰ Article 39 of the Third Directive.

¹⁶¹ Article 3 (8) of the Third Directive.

¹⁶² Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of ‘politically exposed person’ and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis, OJ L 214/29, 4.8.2006.

¹⁶³ Article 2 of the Directive 2006/70/EC.

¹⁶⁴ Article 2(2) of the Directive 2006/70/EC.

¹⁶⁵ Article 3(3) of the Directive 2006/70/EC.

The institutions and persons covered by the Third Directive¹⁶⁶ are required, in particular, (1) to have appropriate risk-based procedures to determine whether the customer is a politically exposed person, (2) obtain senior management approval for establishing business relationship with such customers and (3) take adequate measures to establish the source of wealth and source of funds that are involved in the business relationship or transaction.¹⁶⁷ In this context, it is important to note that the EU also takes into account the international standards developed in this area, in particular the recommendations developed by the Basel Committee on Banking Supervision, which give guidance in the area of customer identification and ongoing account monitoring.¹⁶⁸ In the Council's view these recommendations should become standard in all credit institutions in the EU.¹⁶⁹

It needs to be concluded that the Third Directive greatly contributes to the international efforts to combat corruption, as it helps to detect cases of corruption among individuals holding or having held public positions, particularly those from countries where corruption is widespread. Although EU anti-corruption instruments do not directly address passive or active bribery of officials from third countries, EU anti-money laundering provisions contribute indirectly to the prevention and detection of such cases. Of special importance here is provision, which provides that 'money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country.'¹⁷⁰ In other words, the laundering of the proceeds of corruption, even where the offence of corruption itself took place in a non-Member State, is illegal within EU territory.

¹⁶⁶ Article 3 of the Third Directive.

¹⁶⁷ Article 13 of the Third Directive.

¹⁶⁸ Basel Committee on Banking Supervision, 'Customer due diligence for banks' (2001)

<<http://www.bis.org/publ/bcbs85.htm>> accessed 16 December 2007.

¹⁶⁹ Council of the European Union, '2376th Council meeting—Ecofin and Justice, Home Affairs and Civil Protection' 12831/01, 16.10.2001.

¹⁷⁰ Article 1(3) of the Third Directive.

Investigations against corruption and the tracing of assets can be seriously hindered by banking secrecy provisions, so measures have been adopted at EU level to limit such provisions. The Protocol¹⁷¹ adopted in 2001, aims at improving mutual assistance in respect of information held by banks and ensures that banking secrecy provisions are not invoked as a reason to refuse a request for assistance from another Member State. For the purposes of a criminal investigation, each Member State must, under the conditions set out in the Protocol, answer to a request sent by another Member State whether a person subject to investigation holds or controls accounts in any bank located in its territory and provide details of these accounts.¹⁷² Additionally, the Protocol sets out the rules on assistance for the purpose of getting information on operations carried out during a certain period on a specified bank account. Such assistance relates to the monitoring of any operations that may take place in the future on a specified bank account, and provisions are included to ensure that any assistance given in accordance with the Protocol is not made known to the holder of the bank account or any third persons.¹⁷³ The obligations set out in the Protocol apply to investigations of corruption cases and regarding the laundering of proceeds generated by corruption.¹⁷⁴

More recently, corruption has also found its place in the EU anti-terrorist financing agenda. In the aftermath of the 11 September 2001 attacks, terrorist financing became the object of EU attention. As in the area of anti-money laundering, the strategy against terrorist financing started as a separate policy, but it has a direct relevance for the fight against corruption. The legislative measures in this area aim not only at preventing the misuse of financial systems by terrorists moving their funds, but they increase the transparency of payment flows and contribute to the detection of abuses of financial systems by any illegal activity, including the transfer of the proceeds of corruption. In particular, they establish a system where transfers of funds are accompanied by complete

¹⁷¹ Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, (adopted 16 October 2001, not entered into force), OJ C 326, 21.11.2001.

¹⁷² Article 1 of the Protocol.

¹⁷³ Article 2-4 of the Protocol.

¹⁷⁴ Article 1 (3) of the Protocol.

information on the payer and introduce a duty to declare cash, which includes details of, *inter alia*, the owner and the intended recipient of the cash, by natural persons when entering or leaving the Community.¹⁷⁵

1.4. Monitoring mechanisms

An effective monitoring system is important in this policy area because it allows not only to identify weaknesses and possibilities for improvement, but also to find the best practices in the area.¹⁷⁶ As Chapters Five and Six will discuss in more detail, for the purposes of its enlargement policy, the EU developed a mechanism specifically to monitor the general progress of efforts to prevent and combat corruption within the CEE candidate countries which joined the EU in 2004. As far as policy towards the Member States is concerned, the EU does not have such an evaluation mechanism. The EU has only powers to monitor implementation of its anti-corruption instruments, and these powers differ fundamentally depending on the legal measure employed and, above all, whether the measure was adopted under the first or third pillar.

Under the first pillar, the Commission has enforcement powers against a Member State that fails to implement, or implements incorrectly, the Community legislation and may start an infringement procedure before the Court of Justice to ensure compliance with Community law.¹⁷⁷ In addition, a Member State which considers that another Member State has failed to comply with obligations under the EC Treaty may bring the matter before the Court of Justice.¹⁷⁸ The duty to comply with the first pillar measure is

¹⁷⁵ Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds, OJ L 345/1, 8.12.2006; Regulation No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community, OJ L 309, 25.11.2005; Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319/1, 5.12.2007.

¹⁷⁶ J. Monar, 'Justice and Home Affairs' (2001) *Journal of Common Market Studies*, Supplement Vol. 39 No. 3, 121-137, at 135.

¹⁷⁷ Article 226 EC.

¹⁷⁸ Article 227 EC.

reinforced by the principle of state liability for breach of EC law developed by the Court of Justice¹⁷⁹ and the preliminary ruling procedure, which ensures uniform interpretation of Community measures within Member States.¹⁸⁰ The Commission also reports annually on the application and enforcement of Community law to the Council and EP¹⁸¹ and maintains the Internal Market Scoreboard, which ranks the Member States depending on how they performed in implementing internal market *acquis* into national law.¹⁸² The peer pressure it creates and public exposure is an effective way to push transposition rates up.¹⁸³ In addition, the monitoring of implementation may be foreseen by the individual instruments. For example, the Third Directive against money laundering provides that by 15 December 2009, and at least at three-yearly intervals thereafter, the Commission shall draw up a report on the implementation of this Directive and submit it to the EP and the Council.¹⁸⁴

The situation under the third pillar is much more complex and requires careful consideration. The intergovernmental nature of cooperation in tackling criminal matters is also reflected in the organisation of the monitoring system. The Commission does not have enforcement powers similar to those under the first pillar, and the EU Treaty does not provide for any monitoring mechanisms which would allow for the systematic evaluation of the implementation of the *acquis*. The extent of monitoring depends on the type of and provisions of individual legal instruments, and as a consequence every anti-corruption instrument entails different monitoring procedures.

¹⁷⁹ Cases C-6 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357 and Cases C-46/93 & C-48/93 *Brasserie du Pêcheur SA v. Germany, and R. v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029.

¹⁸⁰ Article 234 EC.

¹⁸¹ For the text of the Annual Reports, see:

<http://ec.europa.eu/community_law/infringements/infringements_annual_report_en.htm> accessed 16 December 2007.

¹⁸² Internal Market Scoreboard: <http://ec.europa.eu/internal_market/score/index_en.htm> accessed 16 December 2007.

¹⁸³ Commission (EC), 'Internal Market Scoreboard' (Special edition, 2002), at 6

<http://ec.europa.eu/internal_market/score/docs/score11/score11-text_en.pdf> accessed 16 December 2007.

¹⁸⁴ Article 42 of the Third Directive.

There is a separate monitoring framework for implementation of the instruments aiming to combat corruption that affects the EC financial interests. In particular, the Member States are required to transmit to the Commission the text of the provisions transposing the PIF Convention and its two Protocols into their domestic law.¹⁸⁵ On that basis, in 2004 the Commission adopted a report assessing the implementation of these instruments by the old fifteen Member States.¹⁸⁶ It contains a detailed analysis of the national criminal laws and the chosen method of implementation.¹⁸⁷ It is interesting to follow the Commission's argumentation on how it should evaluate the PIF instruments. The starting point for the Commission's evaluation is acceptance that the PIF Convention and its Protocols resemble traditional public international law instruments and therefore appear to be subject to international law, particularly the Vienna Convention on the Law of Treaties, but this does not contain any rules making it possible to assess whether a State that has concluded a treaty is actually fulfilling the obligations imposed by it.¹⁸⁸ As a result, the Commission decided to employ the general evaluation criteria developed by the Court of Justice with respect to Directives and Framework Decisions (practical effectiveness, clarity and legal certainty, full application).¹⁸⁹

There are four main weaknesses in the monitoring system foreseen by the PIF instruments. First, there is no deadline for implementation of these instruments. Second, the PIF Convention does not indicate the deadline for submission of the relevant information to the Commission. Third, in its assessment the Commission relies only on the information sent to it by Member States and it does not have the option to conduct on-the-spot visits in Member States or verify the information in any other way. Fourth

¹⁸⁵ Article 10 of the PIF Convention.

¹⁸⁶ Commission (EC), 'Report from the Commission: Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols. Article 10 of the Convention', COM(2004) 709 final, 25.10.2004.

¹⁸⁷ Commission (EC), 'Annex to the Report from the Commission. Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols. Article 10 of the Convention' SEC(2004) 1299, 25.10.2004.

¹⁸⁸ *Ibid*, at 9 -10.

¹⁸⁹ *Ibid*, at 10-11.

and finally, the EU has very limited options to respond in cases of inadequate implementation. In 2004, the Commission concluded that none of the Member States fully complied with the PIF instruments¹⁹⁰, but it could only recommend the Council to 'invite' the Member States to step up their efforts in implementing the PIF instruments.¹⁹¹

The uniform interpretation of the PIF instruments is ensured by the Protocol¹⁹² on the interpretation by way of preliminary rulings by the Court of Justice. In addition, under Article 35(7) EU, the Commission has the option to bring legal action in the Court of Justice regarding the interpretation and application of conventions. Furthermore, in accordance with Article 35(1) EU the Court of Justice has jurisdiction, subject to a Member State's acceptance, to give preliminary rulings on the interpretation of the conventions and on the validity and interpretation of the measures implementing them.

Although the Anti-Corruption Convention has the same legal status as the PIF instruments, it does not provide for a similar monitoring mechanism. The probable reasons for enhanced monitoring of the PIF instruments is that, although placed in the third pillar, they pursue an objective and purpose which is also to be achieved under Article 280 EC Treaty. Apart from the above mentioned option to bring a legal action under Article 35(7), there is no genuine mechanism which allows evaluating the implementation and correct application of the Anti-Corruption Convention.

That said, the Council does keep track of the progress made with implementation of the anti-corruption measures and compliance with the deadlines. For example, in 2001 the Council prepared a questionnaire for Member States to monitor the progress towards ratification of all EU anti-corruption instruments, the Council of Europe and the

¹⁹⁰ Commission (n 186), at 7.

¹⁹¹ *Ibid*, at 8.

¹⁹² Protocol drawn up on the basis of Article K.3 of the Treaty on European Union on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, (adopted 29 November 1996, entered into force 17 October 2002 among the 15 old Member States), OJ C 151/16, 20.5.1997.

OECD conventions.¹⁹³ This has shown little practical value. As commented above, none of the PIF instruments was speedily ratified by the Member States. The most striking example is the Second Protocol, which more than ten years after its adoption still has not entered into force due to the lack of necessary ratifications.

The situation looks slightly different with regard to the Framework Decision on combating corruption in the private sector. Article 9 of the Framework Decision set the deadline for its implementation as 22 July 2005. By the same date, the Member States were also required to submit to the Council and the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. Due to delays with submitting the relevant information by the Member States, the Commission prepared its report on the implementation of the Framework Decision only in June 2007.¹⁹⁴ The report found that the transposition of the Framework Decision was still at an early stage among Member States. Due to the lack of enforcement powers, the Commission can only invite Member States to step up their efforts. The quality of the Commission's reports depends on whether the Member States forward the information on time. Only two Member States, the Netherlands and Finland, supplied their legislation to the Commission before the due date and at the time of preparation of the report, Malta and Cyprus had not submitted any information to the Commission.¹⁹⁵ This evidence shows that the monitoring system provided for under the Framework Decision does not ensure the timely and effective implementation of EU anti-corruption measures.

Much more comprehensive monitoring systems, based on peer review, exist in other areas of cooperation. The monitoring based on peer review does not take the form of sanctions, but rather depends on mutual encouragement to comply with a given

¹⁹³ Council of the European Union, 'Implementation of instruments on combating corruption-Questionnaire' 7945/01, 11.4.2001 and 'Implementation of instruments on combating corruption' 10627/01, 6.7.2001.

¹⁹⁴ Commission (n 81).

¹⁹⁵ *Ibid*, at 5.

measure. One example is the evaluation carried out by the Standing Committee in the context of the Schengen *acquis*.¹⁹⁶ The evaluation involves the drafting of reports verifying the progress made in meeting the requirements or implementation of the Schengen Convention¹⁹⁷, on-site visits and the issuance of recommendations to the countries concerned.¹⁹⁸ The reports prepared in the context of the Schengen evaluation are confidential.¹⁹⁹

A second example of a monitoring mechanism based on peer review is that established pursuant to the Joint Action²⁰⁰ on evaluating the application and implementation at national level of EU and other international acts and instruments in the fight against organised crime. For the purposes of evaluation, the Presidency with the assistance of the General Secretariat of the Council draws up a questionnaire addressed to all Member States.²⁰¹ After receiving replies to the questionnaire, evaluation teams, comprised of experts designated by the Member States, visit the evaluated Member State and meet its political, administrative, police, customs and judicial authorities.²⁰² On the basis of the reports prepared by these teams, the Council may address a recommendation to a Member State and request that the Member State reports back on the progress it has made.²⁰³ The reports drawn on the basis of the Joint Action are confidential, except when the evaluated Member State publishes the report on its own responsibility.²⁰⁴ The framework developed by the Joint Action is the most comprehensive monitoring system

¹⁹⁶ Executive Committee, 'The Schengen acquis - Decision of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/ Com-ex (98) 26 def.)', OJ L 239, 22.09.2000.

¹⁹⁷ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239/19, 22.09.2000.

¹⁹⁸ See (n 196).

¹⁹⁹ Ibid.

²⁰⁰ Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, OJ L 344, 15.12.1997.

²⁰¹ Article 5 of the Joint Action 97/827/JHA.

²⁰² Article 6 of the Joint Action 97/827/JHA.

²⁰³ Article 7(3) of the Joint Action 97/827/JHA.

²⁰⁴ Article 9(2) of the Joint Action 97/827/JHA.

among these developed under the third pillar. According to the Commission, this mechanism has proved useful and effective, but the drawbacks are: the scope is limited to only matters related to organised crime and the limited dissemination of the evaluation results.²⁰⁵ Despite these shortcomings similar mechanism was also developed in the area of the fight against terrorism.²⁰⁶

In 2003 the Commission expressed an opinion that a separate EU anti-corruption evaluation and monitoring mechanism is inappropriate, as it would mean duplication of international activities in this area.²⁰⁷ Such a stance of the Commission met with criticism of the Transparency International, which has pointed out that the EU should develop a separate mechanism to monitor the implementation of EU instruments and initiatives.²⁰⁸ The general need for an evaluation mechanism of the EU policies under the third pillar was also underlined by the Council in 2004 in the Hague Programme.²⁰⁹ In response, the Commission adopted a Communication setting out a proposal on how to develop an evaluation mechanism in the area of EU policies on freedom, security and justice, including anti-corruption instruments.²¹⁰ The major advantage of the mechanism proposed by the Commission would be its stress on evaluating the effects of any measures taken.²¹¹ The new evaluation system would bring substantial changes in the way anti-corruption instruments are monitored. In order to assess the implementation of EU instruments in this area, the Commission recommends using statistical information, such as number of prosecutions, number of new crimes that were detected and

²⁰⁵ Commission (EC), 'Evaluation of EU Policies on Freedom, Security and Justice' COM(2006) 332 final, 28.6.2006, at 96.

²⁰⁶ Council of the European Union, 'Council Decision establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism' 12715/02, 11.10.2002.

²⁰⁷ Commission (EC), 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy Against Corruption' COM(2003) 317 final, 28.5.2003, at 9.

²⁰⁸ Transparency International, 'Comments on the European Commission Communication on "A Comprehensive EU Policy Against Corruption"' (2003), at 4
<http://www.transparency.org/content/download/2017/12199/file/tibrussels_on_eu_commission.pdf>
accessed 14 December 2007.

²⁰⁹ Council of the European Union, 'The Hague Programme: strengthening freedom, security and justice in the European Union' 16054/04, 13.12.2004, at 5-6.

²¹⁰ Commission (n 205).

²¹¹ Ibid, at 4.

successfully prosecuted as a result of EU instruments and surveys of corruption in an evaluated country.²¹² The Commission also highlighted the need to engage civil society in the evaluation of all policies in the area of freedom, security and justice.²¹³ This is particularly important in the area of anti-corruption, as it ensures a more objective view of the practical effects of how legislation is functioning in practice.

Changes in the evaluation of the judicial and police cooperation in criminal matters are also envisaged by the Treaty of Lisbon. Firstly, as Chapter Two discussed, the Treaty of Lisbon would abolish the pillar structure of the EU and the Commission would gain enforcement powers over instruments in this area. Secondly, the Treaty of Lisbon provides for laying down arrangements for the objective and impartial evaluation of the implementation of Union policies in the area of freedom, security and justice.²¹⁴ As Monar has pointed out, the model for this provision has been based on the peer review in the Schengen context, which already led to some positive results and complements the much harder and more inflexible enforcement proceedings before the Court of Justice.²¹⁵

The EU also recognises the value of other international monitoring mechanisms and takes advantage of them. Member States voluntarily agree to more intrusive international monitoring systems based on mutual evaluation and peer pressure established by FATF, MONEYVAL, GRECO and the OECD WG, which were discussed in Chapter One. All old Member States are members of FATF. In relation to these countries, FATF also evaluates the compliance with the EC Directives against money laundering. The evaluations of the remaining 12 new Member States, which are not themselves members of the FATF, are conducted in co-ordination with the EU. The Commission, as a full member of FATF, is committed to implementing the agreed FATF

²¹² Ibid, at 76.

²¹³ Ibid, at 6.

²¹⁴ Article 61C of the Treaty of Lisbon.

²¹⁵ J. Monar, 'Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the 'Area of Freedom, Security and Justice'?' (2005) *European Constitutional Law Review* 1, 226-246, at 242-243.

measures against money laundering and terrorist financing. It is important to note, however, that the Community is not subject to FATF evaluation process, only the Member States are on their right. Nonetheless, as a result of participation in FATF the subsequent anti-money laundering Directives were amended in line with revised FATF Recommendations. In this way, the Community extends application of the FATF standards to the Member States which are not members of FATF. In addition, these Member States participate in a monitoring system undertaken by the MONEYVAL, which evaluates a country's compliance with international standards in this field, including the FATF Recommendations, the relevant instruments of the Council of Europe and the UN, and, most importantly, the Directives against money laundering. In the area of anti-corruption, all Member States participate in the monitoring mechanism of GRECO and majority of the Member States are also members of the OECD WG.²¹⁶

2. Cooperation with international organisations

International initiatives constitute a very important part of the EU strategy against corruption. In constructing its policy in this area, the EU builds on top of activities of various international agencies. As already discussed in Chapter Two, in the Commission's view the EU should limit its own policy to measures which are not already covered by other international organisations.

The EU takes part in the negotiations to develop international instruments against corruption at both regional and global level, in particular in the Council of Europe, the OECD and the UN. In two Common Positions²¹⁷ on negotiations in the Council of Europe and OECD, the Member States are asked to coordinate the work on corruption in

²¹⁶ Except for Romania, Latvia, Lithuania, Malta and Cyprus which did not adopt the OECD Convention. For chart of ratification, see: <<http://www.oecd.org/dataoecd/59/13/1898632.pdf>> accessed 17 December 2007.

²¹⁷ Common Position of 6 October 1997 defined by the Council on the basis of Article K.3 of the Treaty on European Union on negotiations in the Council of Europe and the OECD relating to corruption, 97/661/JHA, OJ L 279/1, 13.10.97 and Second Joint Position of 13 November 1997 defined by the Council on the basis of Article K.3 of the Treaty on European Union on negotiations held in the Council of Europe and the OECD on the fight against corruption, 97/783/JHA, OJ L 320/1, 21.11.97.

three organisations to ensure that there is no incompatibility and that initiatives of one organization do not jeopardise or unnecessarily duplicate work carried out in the other organization. In both documents, the Member States are also asked to coordinate their positions on all issues which have significant interests of the EU. They outline certain position concerning, *inter alia*, the scope of the conventions, definitions and jurisdiction, which the Member States agreed to uphold during the negotiations on the OECD and the Council of Europe instruments. Furthermore, the EU was actively involved in the negotiations on the text of the UNCAC.²¹⁸ The EU also acknowledged the important role it could play in ensuring the successful outcome of the future negotiations on the UNCAC and recognised that it must engage in an open dialogue with countries outside the EU to ensure accession to the convention by as many states as possible.²¹⁹

The provisions of the UNCAC provide that regional economic integration organisations, such as the EU, may become parties to the Convention if at least one of its Member States has done likewise.²²⁰ As of 17 December 2007, all Member States with the exception of Estonia and Slovenia, have signed the UNCAC.²²¹ The EU as an entity, however, does not have a legal personality and therefore cannot be a party to international treaties. It is only the Community that has a competence to accede to the UNCAC.²²² In 2002 the Council authorised the Commission to negotiate the provisions of the UNCAC that were subject to Community competence. These include the UNCAC provisions on public procurement, auditing and accounting and the prevention of money laundering, as well as a series of measures which, as already discussed in Chapter Two,

²¹⁸ For example: Council of the European Union, 'Initiative of the Kingdom of Denmark concerning the adoption by the Council of a draft third common position defined by the Council on the basis of Article 34(2)(a) of the Treaty on European Union on negotiations within the United Nations to draw up a United Nations Convention against Corruption' 12215/2/02, 30.10.2003.

²¹⁹ Council of the European Union, 'Co-ordinated Position of the European Union on the Preparation for the future UN Convention on Corruption and the Second Global Forum on Fighting Corruption and Safeguarding Integrity' 6689/01, 28.2.2001.

²²⁰ Article 67 of the UNCAC.

²²¹ For chart of signatories, see: <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>> accessed 17 December 2007.

²²² Article 281 EC.

the Community could apply to its own administration.²²³ The UNCAC was signed on behalf of the Community on 15 September 2005, subject to a possible conclusion at a later date.²²⁴ In 2004 the Community has already concluded the UNCATOC, which as observed in Chapter One, includes several anti-corruption provisions.²²⁵

The EU also encourages Member States and candidate countries to sign the relevant international instruments. As Chapter Six will discuss, the international conventions against corruption are part of the accession *acquis*, which every candidate country has to adopt. The Commission and the Council have also repeatedly called on existing Member States to ratify the relevant conventions of the Council of Europe, the UN and the OECD, and to join the GRECO.²²⁶

Conclusion

The EU legal and institutional framework does not adequately address the problem of corruption within the Member States. The anti-corruption *acquis* is very limited and fragmented. Generally, the legislative action at the EU level is confined to the approximation of the criminal law definitions of corruption in public and private sectors, the extension of anti-corruption provisions to officials of Community and other Member States, the criminalisation of the laundering of the proceeds of corruption and the introduction of liability regarding heads of businesses and legal persons. The EU accepts a very narrow definition of corruption as bribery and, in contrast to the Council of Europe and the UN, does not criminalise other forms of corruption.

²²³ Commission (EC), 'Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption' COM(2006) 82 final, 2.3.2006, see Annex II.

²²⁴ Council of the European Union, 'Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption' 11188/1/06, 18.7.2006.

²²⁵ Council of the European Union, 'Decision on the conclusion, on behalf of the European Community, of the United Nations Convention against Transnational Organised Crime' 8763/04, 27.4.2004.

²²⁶ Commission (n 207), at 8. Second Communication, at 8 and Council of the European Union, 'The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium' 6611/00, 3.3.2000, recommendation 27.

Analysis of the EU legislative measures confirms that the assumption behind the adoption of EU anti-corruption measures is to safeguard the proper functioning of the internal market. Corruption is treated as a negative externality in the process of building the internal market, rather than a danger for democracy and the rule of law. This is proved by the facts that EU measures focus on cross-border corruption and that Member States are allowed to limit criminalisation of corruption in the private sector to conduct which involves, or could involve, a distortion of competition. By comparison, international instruments on corruption in the private sector do not provide for similar restrictions.

The EU addresses the problem of corruption within Member States mainly through the use of criminal law measures that focus on repression of the offence. The prevention of corruption is regulated to a certain degree by the Community through legislation on public procurement and the obligation for the EU companies to comply with international accounting and auditing standards. Moreover, measures in the area of money laundering and terrorist financing increase the transparency of the financial system and contribute towards the detection of abuses within financial systems involving any illegal activity, including transferring the proceeds of corruption. Beyond this, however, the EU has no further strategy to prevent corruption within Member States.

The EU instruments address corruption at a certain minimum level. They do not address many important aspects that should be considered if corruption within the Member States is to be effectively tackled, including preventive policies in both the public and private sectors, the financing of political parties²²⁷, the establishment of independent anti-corruption bodies, the protection of persons reporting corruption or compensation for damage suffered as a result of a corrupt act. Another serious shortcoming of the EU framework is the lack of an effective monitoring system. The evaluation of anti-corruption instruments adopted under the third pillar is patchy and

²²⁷ It is important to note that the financing of European political parties is regulated at the EU level by Regulation No 2004/2003, OJ L 297, 15.11.2003, which, however, does not apply to national political parties.

highly ineffective. At the same time, Member States are part of a pan-European network with a more rigorous monitoring in the area of money laundering and corruption with the full support of the EU. None of these monitoring mechanisms, however, evaluates the effectiveness of EU anti-corruption initiatives. The added value of the EU instruments is clearly visible only in the area of judicial and police cooperation in criminal matters. Here, the burdensome traditional cooperation foreseen by international instruments is being increasingly replaced by mutual recognition of judgements and pre-trial orders.

As has been pointed out, the EU ‘...lags behind several other international organisations in terms of the creation of anti-corruption instruments and mechanisms.’²²⁸ This is in stark contrast to the area of money-laundering legislation, where policy is regularly updated in accordance with international standards. While the Commission has declared that the goal of EU policy is to fight corruption within Member States in a coherent way²²⁹, the EU has not taken the necessary steps to develop such a coherent strategy. As commented in the OSI Report, ‘...the EU clearly lacks a framework of anti-corruption standards or a mechanism for monitoring adherence to such a framework.’²³⁰ It is, therefore, hard to disagree with Webb, who has pointed out that ‘to date, it seems the EU makes bold statements in non-binding instruments, but drafts narrow and specific legal initiatives.’²³¹

The OSI report argues that there are two possible reasons for the lack of a more coherent framework at the EU level. First, there is a difference in the extent and nature of corruption across Member States with, for example, deeply embedded bureaucratic traditions of rectitude and probity characteristic of the northern Member States

²²⁸ Open Society Institute, ‘Monitoring the EU Accession Process: Corruption and Anti-Corruption Policy’, 2002, at 74 (OSI Report) <<http://www.eumap.org/reports/2002/corruption>> accessed 6 December 2007.

²²⁹ Commission (n 207), at 5.

²³⁰ OSI Report (n 228).

²³¹ P. Webb, ‘The United Nations Convention against Corruption. Global Achievement or Missed Opportunity’ (2005) *Journal of International Economic Law*, Vol. 8 No. 1, 191-229, at 202.

contrasting with the more relaxed style of public service characteristic of France.²³² Second, corruption, so far, has not undermined the ability to implement the *acquis*.²³³ However, as Reed has pointed out, even if corruption significantly undermined implementation of the *acquis*, the EU would be unlikely to take the initiative in confronting corruption.²³⁴ This is due to the sensitivity of the issue and the interest of some political elites in sustaining elements of corruption, as well as national resistance against external efforts to introduce any legislation or reform, especially as corruption is often regarded as falling under the purview of sovereign ministers.²³⁵

The inadequacy of the EU anti-corruption framework became visible in the context of the accession of the CEE countries into the EU. The entrenched levels of corruption in the candidate countries forced the EU to develop a new and more coherent anti-corruption strategy for the purposes of its enlargement policy. The next chapter opens the discussion on these developments by explaining how it was possible for the EU to demand anti-corruption reforms from the candidate countries.

²³² OSI Report (n 228), at 34-35.

²³³ Ibid.

²³⁴ Q. Reed, 'Corruption and the EU accession process: who is better prepared?', in Transparency International, *Global Corruption Report 2004*, at 124-125
<http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2004#download> last accessed 6 December 2007.

²³⁵ Ibid.

Conditionality in the EU accession process

The 2004 enlargement was the fifth enlargement in the EU history. It was also the biggest and most challenging of all the EU enlargements. As Cremona observed, it was perceived as much more than just a 'joining of the club' by a few more countries and has had an immense political and psychological significance as a 'return to Europe' by the CEE countries after the end of the divisions of the Cold War.¹

One of the most prominent features of the 2004 enlargement process was conditionality, defined as the linking, by a state or international organization, of perceived benefits to the fulfilment of certain conditions.² Setting the legal, political and economic membership conditions for joining the EU is a form of conditionality. In the pre-accession process, conditionality followed 'a strategy of reinforcement by reward', which meant that the EU paid the reward if the government of a candidate country

¹ M. Cremona, 'EU enlargement: solidarity and conditionality' (2005) *European Law Review* 30, 3-22, at 8.

² K.E. Smith, 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?' (1998) *European Foreign Affairs Review* 3, 253-274, at 256.

complied with the conditions and withheld the reward if it failed to comply.³ As Cremona noted, the conditionality within the EU's pre-accession process was designed to ensure that a candidate country's political, economic and regulatory development converged with the values and norms within the EU.⁴ Membership conditions were meant to ensure the proper functioning of the EU after the accession took place and also to reassure existing Member States that accession would not destabilise the EU. These concerns led to the establishment of extensive membership requirements and the application of both economic and political conditionality to encourage the CEE countries to carry out necessary reforms.

The EU used conditionality as a tool to influence the content of the internal policies of candidate countries. The CEE countries were expected to meet all the conditions and were not able to decide on the content of conditions with the exception of temporary transitional periods. Combating corruption became an important membership condition for the first time during the 2004 enlargement. It was also one of the most difficult requirements that the CEE countries had to satisfy before accession.

Two types of conditionality have been distinguished by Schimmelfennig and Sedelmeier: democratic conditionality and *acquis* conditionality.⁵ While democratic conditionality concerns the fundamental political principles of the EU, the norms of human rights and liberal democracy, the *acquis* conditionality concerns the precise rules of the *acquis*.⁶ As Chapter Two discussed, the EU does not have a general competence to monitor national anti-corruption policies of Member States. The existing anti-corruption *acquis* is too narrow to serve as a model for anti-corruption policies in the candidate countries. Therefore, the membership condition to prevent and combat corruption falls into the category of democratic conditionality applied by the EU.

³ F. Schimmelfennig and U. Sedelmeier, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe' (2004) *Journal of European Public Policy* 11:4, 661-679, at 663.

⁴ Cremona (n 1), at 15.

⁵ Schimmelfennig and Sedelmeier (n 3), at 669.

⁶ *Ibid.*

The EU was not the only international organisation trying to instil democratic norms in post-communist societies. After the collapse of communism the CEE countries also sought membership in the Council of Europe and NATO. Both organisations used democratisation as a criterion for membership, and the membership in the Council of Europe was even considered a basic prerequisite for EU entry.⁷

The Council of Europe also set democratic criteria for membership but was less strict in applying them than the EU. These criteria included: (1) free and fair elections based on universal suffrage; (2) freedom of expression and the media; (3) protection of the rights of national minorities and (4) accession to the European Convention on Human Rights.⁸ The approach of the Council of Europe was, however, different from the one taken by the EU, as it was not based on rigorous conditionality before accession. Instead, it was based on a vague idea of ‘...post-membership socialization into western democratic practices.’⁹

The fight against corruption was also a NATO membership requirement. Corruption undermines the democratic rule of law, which is considered essential for NATO membership. Moreover, it facilitates the spread of organised crime and ‘...creates an environment in which NATO members cannot be confident that classified information will be protected.’¹⁰ In order to fulfil the NATO membership requirements, it was essential for the aspirant countries to show a strong degree of commitment to

⁷ K.E. Smith, ‘The Evolution and Application of EU Membership Conditionality’ in M. Cremona (ed), *The Enlargement of the European Union* (Academy of European Law European University Institute, OUP 2003), 105-140, at 115.

⁸ K.E. Smith, ‘Western Actors and the Promotion of Democracy’ in J. Zielonka, J. and A. Pravda, A. (eds), *Democratic Consolidation in Eastern Europe. Volume 2: International and Transnational Factors*, (OUP, 2001), 31-57, at 41.

⁹ A. Dimitrova and G. Pridham, ‘International Actors and Democracy Promotion in Central and Eastern Europe: The Integration Model and its Limits’ (2004) *Democratization*, Vol. 11 No. 5, 91-112, at 99.

¹⁰ R.A. Bradtke, ‘NATO enlargement’, Testimony Before the House International Relations Committee, Subcommittee on Europe (Washington, DC 2002)

<<http://www.state.gov/p/eur/rls/rm/2002/11289.htm>> accessed 17 December 2007.

combating corruption at the highest levels of government.¹¹ Despite the important benefits of NATO membership for the CEE countries, NATO did not influence the policy-making in these countries to same degree as the EU. As Dimitrova and Pridham observed, in case of NATO membership, democratic requirements were traditionally less important than the security matters.¹² It therefore seems that the post-communist countries were invited to join in, not because they made progress in fulfilling the specific membership requirements, but because of their geographic position and the ‘...widespread perception that they were Eastern Europe's liberal democratic frontrunners.’¹³

The EU turned out to be the most successful in fostering the political and economic changes in the CEE countries. This was due to the extensive and detailed membership conditions combined with strong conditionality tools. This chapter argues that the EU had the political capacity and the necessary mechanisms to effect anti-corruption policy changes in CEE candidate countries. The goal of this chapter is to examine the potential of the EU to promote anti-corruption reforms in the candidate countries. The chapter starts by discussing how and why combating corruption became one of the most important membership conditions. Then the chapter presents the conditionality tools used by the EU to influence domestic anti-corruption policies. Finally, the chapter distinguishes two stages in the application of the EU conditionality and explains the leverage that the accession process provided the EU over the anti-corruption policies in candidate countries.

1. The general conditions of accession

The basic condition of ‘European’ identity was the only condition set out in the 1957 Treaty of Rome. As explained by the EP, ‘there is no unequivocal interpretation of that

¹¹ Ibid.

¹² Dimitrova and Pridham (n 9), at 100.

¹³ M.A. Vachudova, *Europe Undivided - Democracy, Leverage, and Integration After Communism* (OUP 2005), at 135.

criterion. It can be read equally well in geographical, cultural or political terms.¹⁴ Although it was not mentioned explicitly by the Treaty, the candidate countries also had to fully accept and implement the *acquis*. The first enlargement of the Communities, when the UK, Ireland and Denmark were admitted in 1973, did not require fulfilment of any other explicit membership criteria.¹⁵

The membership conditions were further developed for the purposes of the enlargements of the EU in 1981 and 1986. In its Opinion on the Greek accession, the Commission indicated that pluralist democracy and respect for human rights were also conditions of membership, which was later reiterated in the Opinions concerning the applications of Spain and Portugal.¹⁶ However, as Smith has noted, apart from noting that democracy had been restored in those three countries, the Commission did not explain what specific criteria it used to reach this conclusion.¹⁷ In 1992, in a document prepared for the European Council, the Commission confirmed that a candidate country must satisfy the three basic conditions of European identity, democratic status and respect of human rights.¹⁸ In addition, the Commission pointed out that the obligations of membership presuppose a functioning and competitive market economy as well as and an adequate legal and administrative framework in the public and private sectors.¹⁹ With the adoption of the Treaty of Amsterdam in 1997, the membership conditions were reiterated and formalised in Article 49 EU Treaty which stated that any European state that respects the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law may apply to become a member of the EU.

¹⁴ European Parliament, 'Legal questions of enlargement' (1998), Briefing No 23, PE 167.617, at 5.

¹⁵ Smith (n 7), at 109.

¹⁶ F. Hoffmeister, 'Changing requirements for membership' in A. Ott and K. Inglis (eds), *Handbook on European Enlargement* (T-M-C Asser Press, 2002), 90-102, at 93.

¹⁷ Smith (n 7), at 110.

¹⁸ 'Europe and the challenge of enlargement', *EC Bull. Supplement* 3/92 (24 June 1992), at 11.

¹⁹ *Ibid.*

2. The requirements of the 2004 enlargement

Considering the political and economic situation of the CEE countries, some comparison can be made to the accession of Greece, Spain and Portugal in the 1980s, which were also undergoing democratic transition after long periods of dictatorship. Unlike the CEE countries, however, these countries had most of the features of a market economy.²⁰ Moreover, they were allowed ‘...considerable compromises and adaptations after their entry to the EU’ and ‘the consolidation of democracy in these countries was expected to take place after membership...’²¹ Greece, however, was allowed to reform its state administration and implement the *acquis* after accession so that membership in the EU could strengthen and protect its new democracy.²² As Vachudova pointed out, the Commission realised that the accession of ten countries as ill prepared as Greece would be a ‘full-blown disaster’ for the EU and therefore insisted that all requirements be met before the accession.²³

For the purposes of the 2004 enlargement, ‘...the EU developed the most complex and extensive set of conditions it has ever used towards third countries.’²⁴ The membership criteria were communicated to the candidate countries through the European Council conclusions, agreements between the EU and each candidate country and in various pre-accession documents. The membership conditions covered a wide range of key public areas, and their aim was to foster and guide the transition to democracy and a market economy in each of the post-communist countries.

²⁰ N. Nugent, ‘Distinctive and Recurring Features of Enlargement Rounds’ in N. Nugent (ed), *European Union Enlargement* (Palgrave Macmillan, 2004), 56-69, at 56.

²¹ A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (CUP, Cambridge Studies in European Law and Policy, 2005), at 50.

²² Vachudova (n 13), at 112.

²³ Ibid.

²⁴ A. Dimitrova, ‘Enlargement, Institution-Building and the EU’s Administrative Capacity Requirement’ (2002) *West European Politics*, Vol. 25 No. 4 (October 2002), 171-190, at 175.

2.1. The Copenhagen criteria

The EU first outlined the political and economic membership criteria in 1993 at the Copenhagen European Council in what is known as the 'Copenhagen criteria'. For the first time, it was formally acknowledged that '... the associated countries in Central and Eastern Europe that so desire shall become members of the European Union.'²⁵ According to the 'Copenhagen criteria', EU membership required that the candidate country achieve three main goals: (1) stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities (political criteria); (2) the existence of a functioning market economy and the capacity to cope with competitive pressures and market forces within the Union (economic criteria) and (3) the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.²⁶ Whereas the fulfilment of the political criteria was a condition for the opening of accession negotiations, the economic criteria and adoption of the *acquis* were to be achieved before the accession.

The general conditions of democracy, a market economy and the ability to take on the *acquis* to large extent resemble the general conditions of accession previously established by the Member States. The 'Copenhagen criteria' were very general and vague. They gave little guidance to the CEE countries as to what the EU standards were or how to achieve them. The EU did not explain how it understood the 'the stability of institutions guaranteeing democracy' and 'the rule of law' or 'a functioning market economy.' Such a broad formulation, however, allowed the EU to interpret and further expand on these criteria later in the accession process. As Grabbe has noted, what constituted the 'Copenhagen criteria' was open to interpretation, 'giving the EU considerable discretion in deciding what has to be done before compliance is achieved.'²⁷ The EU was able to use the general 'Copenhagen mandate' to formulate an

²⁵ Copenhagen European Council, Presidency Conclusions, (21 and 22 June 1993).

²⁶ Ibid.

²⁷ H. Grabbe, 'How does Europeanization affect CEE governance? Conditionality, diffusion and diversity' (2001) *Journal of European Public Policy* 8:6, 1013-1031, at 1015.

extensive catalogue of membership requirements in its various policy documents, such as the 1997 Opinions, the annual Regular Reports and the Accession Partnerships.

The third condition formulated by the Copenhagen European Council is concerned with the obligation to fully adopt and implement the EU *acquis*, which comprises:

- the content, principles and political objectives of the Treaties;
- the legislation adopted in application of the Treaties and the case law of the Court of Justice;
- the declarations and resolutions adopted by the Union;
- measures relating to the common foreign and security policy;
- measures relating to justice and home affairs;
- international agreements concluded by the Community and those concluded by the Member States among themselves in the field of the Union's activities.²⁸

For the purpose of accession negotiations, the *acquis* was divided into chapters. The content of the *acquis* was not subject of the accession negotiations, and the candidate countries could only negotiate the date by when they would adopt the *acquis* in full. Grabbe noted that the legislative task which was presented by the EU was largely administrative rather than political, as candidate countries were not expected to debate the introduction of the *acquis*.²⁹ Derogations from the *acquis* were granted only in exceptional circumstances. As noted by Mayhew, in previous enlargements, if parts of the *acquis* were not implemented or badly implemented after the accession, the country could be taken to the Court of Justice, but verification before accession did not take

²⁸ Europa Glossary: <http://europa.eu.int/scadplus/glossary/community_acquis_en.htm> accessed 17 December 2007.

²⁹ Grabbe (n 27), at 1017.

place.³⁰ Therefore it may be argued that the EU attempted to create 'perfect Member States', as a higher level of compliance was required from the CEE countries than from existing Member States.³¹

As well as adopting the *acquis*, each CEE candidate country had to ensure its effective application through appropriate administrative and judicial structures, which in practice means a well developed civil service and judiciary. At its meeting in Madrid, the European Council³² in 1995 stressed the need for the candidate countries to adjust their administrative structures to ensure the harmonious operation of EU policies after accession. The requirement of adequate administrative capacities to apply *acquis*, which ultimately became a fourth condition for accession and not just a supplementary task, was a new condition and had no precedent in previous enlargements.³³

It is important to emphasise that the accession process did not preclude the development of the EU *acquis*, which turned it into a 'moving target' for the candidate countries. In fact, during the pre-accession process, the body of *acquis* developed to an unprecedented extent. In previous enlargements the *acquis* had been far less substantial. In fact, during the accession of Sweden, Finland and Austria the situation was much easier, for they had already adopted much of the *acquis* as participants in the European Economic Area. But after those three countries joined in 1995, European integration moved forward in areas of political integration as well as in the traditional areas of economic integration. One example of this greater integration is the JHA *acquis*, which was for the first time an area of great importance during the accession of the CEE countries.

³⁰ A. Mayhew, 'Enlargement of the European Union: An analysis of the negotiations with the Central and Eastern European candidate countries' (2000) Sussex European Institute Working Paper No.39, at 10, <<http://www.sussex.ac.uk/sei/documents/wp39.pdf>> accessed 17 December 2007.

³¹ Ibid.

³² Madrid European Council, Presidency Conclusions, (15 and 16 December 1995)

³³ Dimitrova (n 24), at 178.

Not only was the *acquis* constantly expanding throughout the accession negotiations, but the accession *acquis* also covered elements originating from outside of the EU framework. This was particularly the case in the field of JHA, where the accession *acquis* also contained international conventions against corruption, to which the candidate countries had to accede independently of the ratification by the Member States. The adoption of these instruments was scrutinised by the Commission in the Regular Reports on the progress towards accession. As will be discussed in Chapter Six, the international conventions constituted an important part of the anti-corruption accession *acquis*.

The actual impact of the EU policy recommendations varied from one domain to another and they worked best when they met with support and a willingness to comply from national governments. However, that support often depended on the legitimacy of the EU demands. After the Copenhagen European Council it became clear that the candidate countries were required to meet higher standards than the old Member States. None of the established Member States had ever been judged with respect to the quality of democratic institutions, the effectiveness of their market economy or the standard of their protection of minorities' rights. This raised a serious problem regarding the legitimacy of EU demands and concerns of double standards. As will be discussed in Chapter Six, the double standards were particularly visible in the area of anti-corruption. The fact that the old Member States were never held to the same anti-corruption standards seriously hindered the EU policy against corruption within the candidate countries. The EU could not legitimately demand from them a more rigorous approach against corruption, while, at the same time, tolerating corruption in its own Member States.

2.2. Combating corruption as a membership condition

In its strategy towards the CEE countries, the EU moved beyond the formal democracy criteria formulated initially with Greece, Portugal and Spain in mind (such as a liberal-

democratic constitution in place with the conventional provisions for accountability, free elections and a predominance of democratic parties) and ‘...shifted decisively into areas of substantive democracy’³⁴, including the fight against corruption.

Combating corruption was not mentioned in the ‘Copenhagen criteria’, but was explicitly recognised as a membership condition four years later in the Opinions on the application of the CEE countries for the membership in 1997.³⁵ The Commission classified corruption as a political requirement for the EU membership and an element of democracy and the rule of law.³⁶ However, as will be discussed in Chapter Five, the Opinions of 1997 did not elaborate on the elements of the anti-corruption strategy or give any other guidance as to the extent of corruption acceptable within the EU. They only mentioned the problem of corruption in the CEE countries in very diplomatic terms.

It was a mistake not to include the need to tackle corruption as part of the ‘Copenhagen criteria’. The EU should have stressed from the outset in 1993 the importance of the fight against corruption for the fulfilment of its membership conditions. This serious omission led to a four-year delay in addressing this problem by the EU and ultimately impaired the success of the EU strategy against corruption within the candidate countries.

The discussion about why corruption did not appear earlier on the EU agenda must be put into a broader international context. As explained in Chapter One, the first international initiatives against corruption took place in the second half of the 1990s. Before 1996, the EU itself did not have any legal instrument addressing corruption. Then in 1997 the OECD Convention was adopted and the Council of Europe defined some

³⁴ Dimitrova and Pridham (n 9), at 97.

³⁵ ‘Agenda 2000: For a Stronger and Wider Union’, EU Bull. Supplement 5/97 (13 July 1997).

³⁶ For example: Commission (EC), Commission Opinion on Poland’s Application for Membership of the European Union (1997), at 14-18 <http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/poland/po-op_en.pdf> accessed 17 December 2007.

key anti-corruption standards in its Twenty Guiding Principles. In other words, 1997 was the year when corruption first gained importance at the pan-European level. When the 'Copenhagen criteria' were formulated in 1993, corruption was just emerging as an international policy problem.

As Chapters Two and Three argued, the EU does not have powers to assess or even discuss the extent of domestic corruption within the Member States. Thus, inclusion of the requirement to fight against corruption did not correspond with any EU policy towards the Member States in this area. Why then did the Commission decide to include corruption in its accession policy?

First, corruption could undermine the fulfilment of all three 'Copenhagen criteria.' The damaging consequences of corruption on democratic and economic transition in the CEE countries were already discussed in Chapter One. In addition, it is important to note that corruption could weaken four of the six elements of the functioning market economy identified by the Commission.³⁷ The OSI report emphasised three elements in particular that are likely to be undermined by corruption, including:

- barriers to market entry and exit are absent;
- the legal system, including the regulation of property rights, is in place, laws and contracts can be enforced;
- the financial sector is sufficiently well developed to channel savings towards investment.³⁸

³⁷ Commission (EC), 'Composite Paper' (1998), at 6
<http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/composite_en.pdf> accessed 17 December 2007.

³⁸ Open Society Institute, 'Monitoring the EU Accession Process: Corruption and Anti-Corruption Policy', 2002, at 21 (OSI Report) <<http://www.eumap.org/reports/2002/corruption>> accessed 6 December 2007.

Corruption, however, has the potential to seriously undermine one other element identified by the Commission, which provides that:

- the equilibrium between demand and supply is established by the free interplay of market forces; prices, as well as trade, are liberalised³⁹

The market is not in equilibrium when projects or goods are offered not to someone who offers the best quality bid, but to someone who offers to pay a bribe. A highly corrupt market is not as efficient as a legal market because, as Rose-Ackerman argued, the information about bribe prices will not be widely available and some potential participants may refuse to enter the market due to moral reasons or fear of punishment and public officials may limit their dealings to insiders or trusted networks.⁴⁰ Compounding these problems, the third EU membership condition, the ability to take on the obligations of membership, would be difficult to fulfil if corrupt practices could occur in the two institutions responsible for implementation of the *acquis*: national courts and public administration.

A second reason for the inclusion of anti-corruption policy in the accession process was the fact that the 2004 enlargement gave the EU the possibility to explain how it understood democracy and the rule of law. The Commission also wanted to guide the CEE countries towards a successful democratic and market economy transition. Therefore, some membership conditions did not correspond to any specific obligations required of the Member States, but reflected high standards of public administration. Combating corruption was seen as an indispensable element of this process. As Dimitrova noted, the conditionality went far beyond ensuring that the EU's institutional rules and norms were established, as for this purpose it has been sufficient to ensure the transposition of the *acquis*.⁴¹ Instead, the EU conditions were 'partially designed to

³⁹ Commission (n 37).

⁴⁰ S. Rose-Ackerman, *Korupcja i rzqdy* (Fundacja im. Stefana Batorego i Wydawnictwo Sic!, 2001), at 49

⁴¹ Dimitrova (n 24).

address transformation problems and weaknesses of the candidates.’⁴² Lastly, as already discussed Chapter One, the EU pre-accession policy was influenced by the widespread perception that corruption in the post-communist countries posed a bigger problem than in the existing Member States.

3. The pre-accession strategy and its instruments

Another new feature of the 2004 enlargement was the importance of the pre-accession strategy designed to help the candidate countries in their preparations for membership. The pre-accession strategy for the CEE countries was launched in 1994 by the Essen European Council⁴³ and subsequently reinforced by the Luxembourg European Council in 1997.⁴⁴ As Inglis has noted, in the previous enlargements the word pre-accession was not applied to the necessary preparations for accession and it was left to the candidate countries to undertake preparations as they saw fit.⁴⁵

To prepare for the 2004 enlargement, the EU provided the candidate countries with technical and financial assistance to help them carry out the reforms required to meet the membership criteria. The assistance corresponded to the priorities, objectives and conditions set out within the pre-accession process. Financial aid was provided only if the countries were committed to political and economic reforms. The main EU financial instrument was the PHARE programme established in 1989. PHARE was created to assist Poland and Hungary, but was gradually extended to cover all eight post-communist countries. At the beginning PHARE assistance was used for the purpose of promoting market-orientated economic reforms, but after 1994 it was extended to cover the area of JHA. As will be discussed in Chapter Six, under the PHARE programme the

⁴² Ibid.

⁴³ Essen European Council, Presidency Conclusions, (9 and 10 December 1994).

⁴⁴ Luxembourg European Council, Presidency Conclusions, (12 and 13 December 1997).

⁴⁵ K. Inglis, ‘The pre-accession strategy and the accession partnership’ in Ott and Inglis (n 16), 103-112, at 103.

EU provided the CEE countries with considerable technical assistance to support anti-corruption reforms.

The pre-accession strategy also involved a set of political and legal instruments through which the EU was able to influence domestic policies in the CEE candidate countries. These instruments were established to help monitor the candidate countries' progress in meeting the accession criteria. The most important of these instruments were the Europe Agreements, the Opinions of July 1997, the Regular Reports and the Accession Partnerships.

3.1. The Europe Agreements

After initial Trade and Cooperation Agreements signed in 1988 and 1989, the EU decided to support the reforms undertaken by the CEE countries and develop even closer cooperation with these countries. Subsequently, the Europe Agreements⁴⁶ were signed between the EU and individual CEE countries. Signed between 1991 and 1996, these were a new type of association agreement that went 'far beyond what is normally expected of a trade agreement'⁴⁷ and were 'the most wide-ranging agreements ever concluded by the EU with third countries.'⁴⁸ From a legal point of view they were mixed agreements, which meant that both the Community and the Member States were contracting parties. As Müller-Graff has explained, this is due to the fact that, although the Community had the competence to conclude an association, the political cooperation under the Europe Agreements fell within the competences of the Member States.⁴⁹

⁴⁶ Europe Agreement with Poland, OJ L 348, 31.12.1993; Hungary, OJ L 347, 31.12.1993; the Czech Republic, OJ L 360, 31.12.1994; Slovakia, OJ L 359, 31.12.1994; Estonia, OJ L 068, 09.03.1998; Latvia OJ L 026, 02.02.1998; Lithuania OJ L 051, 20.02.1998 and Slovenia, OJ L 051, 26.02.1999.

⁴⁷ R. Stawarska, 'EU enlargement from the Polish perspective', (1999) *Journal of European Public Policy* Vol. 6 No. 5, 822-838, at 825.

⁴⁸ U. Sedelmeier and H. Wallace, 'Eastern Enlargement: Strategy or Second Thoughts?' in H. Wallace and W. Wallace, *Policy-Making in the European Union*, (4th edn OUP, 2000), 427-460, at 439.

⁴⁹ P. Ch. Müller-Graff, 'East Central Europe and the European Union: From Europe Agreements to a Member Status: General Report' in P.Ch. Müller-Graff (ed) *East Central Europe and the European Union: From Europe Agreements to a Member Status* (Baden-Baden: Nomos Verlagsgesellschaft, 1997), 9-41, at 15.

The Europe Agreements were not seen as pre-accession agreements. Their preambles only mentioned that membership was the final objective of the CEE countries. Initially, the Commission saw the Europe Agreements as an alternative to accession and as Sedelmeier and Wallace pointed out, 'this fell short of a firm commitment and was interpreted quite widely as antipathy to enlargement.'⁵⁰ The Commission did not expect that the Europe Agreements would gradually evolve into the main vehicle to prepare the CEE countries for accession.⁵¹ In 1993, however, at the Copenhagen European Council, the Europe Agreements were recognised to be the basis of a pre-accession strategy.

The Europe Agreements were the only legally binding agreements signed before accession, and thus they provided the legal framework for relations between the EU and the CEE candidate countries. They all followed the same formula with regard to their content. It is important to emphasise that their main objective was to create a free trade area, and in this sense the Europe Agreements were trade agreements. They started the process of introducing the internal market *acquis* to the candidate countries in the areas of intellectual and commercial property, public procurement, banking, financial services, company accounts and taxes, indirect taxation, technical rules and standards, consumer protection, health and safety, transport, and the environment.⁵² As will be discussed in Chapter Six, they also included several provisions relevant to the fight against corruption.

The Europe Agreements confirmed the use of democratic conditionality in the EU's relations with the CEE countries. The first indication of the conditionality was found in the above mentioned Trade and Cooperation agreements with CEE countries, which included a suspension clause that made the execution of these agreements

⁵⁰ Sedelmeier and Wallace (n 48), at 438.

⁵¹ M. Maresceau and E. Montaguti, 'The Relations between the European Union and Central and Eastern Europe: a legal appraisal' (1995) *Common Market Law Review* 32, 1327-1367, at 1328.

⁵² Vachudova (n 13), at 86.

conditional on respect for human and minorities' rights and democratic principles.⁵³ To begin with, the eligibility for a Europe Agreement depended on the fulfilment of five conditions: rule of law, human rights, a multi-party system, free and fair elections, and a market economy.⁵⁴ Next, the full implementation of association under the Europe Agreements depended on the 'actual accomplishment' of country's political, economic, and legal reforms.⁵⁵ In this way, in the 1990s the EU had already created incentives for the CEE countries to pursue democratic and economic reforms. Such democratic conditionality was visible throughout the entire pre-accession process. The EU wanted to make sure that the CEE countries continued to reform their systems in accordance with the rule of law. As will be observed in Chapter Six, the EU's insistence on stability of institutions guaranteeing democracy in the CEE countries should in the long term contribute in a very beneficial way to reducing the levels of corruption in the CEE countries.

3.2. The 1997 Opinions

In 1997 the Commission conducted its first analysis of the situation in the candidate countries and their progress in fulfilling the political and economic accession criteria. The Commission's Opinions⁵⁶ were designed to identify potential problems that might result from the CEE countries membership and assist the Council in its decision whether to open accession negotiations with each candidate country. They all purportedly followed the same general structure and content, as the Commission wanted to show that it evaluated all ten countries according to the same methods and criteria. As Vachudova noted, the EU adopted a merit based approach to enlargement, which meant that all the

⁵³ Dimitrova (n 24).

⁵⁴ H. Grabbe, 'Partnership for Accession? The Implications of EU Conditionality For the Central and Eastern European Applicants' (1999) EUI Working Paper RSC No. 12, at 10
<http://www.cer.org.uk/pdf/grabbe_conditionality_99.pdf> accessed 17 December 2007.

⁵⁵ For example: Preamble to the Europe Agreement with Poland (n 46).

⁵⁶ 1997 Opinions

<http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/index_en.htm> accessed 17 December 2007.

candidates were subject to the same requirements and evaluated in a manner that has proved to be more or less based on merit.⁵⁷

The Commission encountered a number of difficulties while preparing the Opinions. Due to the simultaneous transformation going on within the CEE countries, the legal and economic rules were changing rapidly, which made it more difficult to give an accurate assessment of the situation. It was especially problematic to judge whether the institutions guaranteeing democracy and the rule of law were stable, as often these institutions were in the process of forming. In addition, even if the appropriate institutions were in place, it was hard to foresee whether they would function effectively in practice.

The assessment of the problem of corruption within the CEE countries contained in the Opinions will be discussed in Chapter Five, but here it is important to emphasise that after release of the Opinions it became clear that corruption was not seen as an obstacle in meeting the political criteria. Starting from 1997, the Commission stated that all the CEE countries, except for Slovakia⁵⁸, presented the characteristics of a democracy with stable institutions that guarantee the rule of law, respect for human rights and the protection of minorities.⁵⁹ It is, however, not entirely clear on what criteria the Commission based its assessments.

⁵⁷ Vachudova (n 13), at 112.

⁵⁸ In the Commission's view Slovakia did not fulfil the political criteria due to six main reasons: (1) the right of parliamentary opposition were not fully respected; (2) respect for the mandates of members of parliament and the procedures governing the work of Parliament was not always guaranteed; (3) the government did not respect the role of other democratic institutions; (4) inadequate control of secret services by parliament; (5) judicial independence was not guaranteed by the legal framework; (6) not fully respecting the rights of minorities, see: Commission (EC), 'Agenda 2000- Commission Opinion on Slovakia's Application for Membership in the European Union', 15 July 1997 <http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/slovakia/sk-op_en.pdf> accessed 17 December 2007.

⁵⁹ For example: Commission (EC), 'Agenda 2000- Commission Opinion on Poland's Application for Membership in the European Union', 15 July 1997 <http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/poland/po-op_en.pdf> accessed 17 December 2007.

All the Opinions evaluated compliance with the political criteria using the same language. There were several reasons for the adoption of such a formulaic approach. Assessing the quality of democracy and the rule of law was a politically sensitive task. The Commission was aware that any differences across the assessments were scrutinised by the candidate countries and could cause political problems. Moreover, the use of identical language signalled to the candidate countries that the standards were the same for all of them.

3.3. The Regular Reports

The Regular Reports provided a summary of candidate countries' progress in meeting the 'Copenhagen criteria' and adopting the *acquis*. They were published from 1998 until the accession and were the main instrument through which the Commission communicated the membership conditions.⁶⁰ Every year, the Regular Reports listed shortcomings and recommendations for improvement for every candidate country. They were widely considered a yearly 'judgment' on the state of reforms.⁶¹ The EU was also systematically helping the CEE countries' governments to identify weaknesses, as the Regular Reports often included specific recommendations for reforms. The EU's support for particular reforms enhanced the credibility of these reforms within the CEE countries. This was of particular importance in the area of anti-corruption reforms, which are difficult to conduct and may be perceived as actions of the government in power against their political opponents. The governments of the candidate countries had a strong incentive to act and be praised by the Commission, as on the basis of these reports, the Council was in a position to decide whether to change the pace of the pre-accession process. As will be seen in Chapters Five and Six, the Commission developed its strategy against corruption within the candidate countries mainly with the use of the Regular Reports.

⁶⁰ Regular Reports

<http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/index_en.htm>
accessed 17 December 2007.

⁶¹ Vachudova (n 13), at 129.

3.4. Accession Partnerships and the National Programmes for the Adoption of the *Acquis*

The Accession Partnerships guided each individual CEE country on how to meet the 'Copenhagen criteria.'⁶² They were drafted by the Commission on the basis of the Regular Reports and then adopted by the Council.⁶³ The first Accession Partnerships were adopted in March 1998 and then amended on a yearly basis. They set out short-term and medium-term priorities for each candidate country taking into account individual needs and shortcomings.

The Accession Partnerships brought together all membership criteria. As Inglis observed, unlike the Europe Agreements, they were the instruments of the Council and thus included non-Community areas of competence, including the fight against corruption.⁶⁴ Examples of reform priorities emphasised through Accession Partnerships include the implementation of a comprehensive anti-corruption strategy⁶⁵, efforts to step up the fight against corruption⁶⁶, the completion and implementation of the Code of Ethics for Civil Servants⁶⁷ and the completion of the legal framework for the fight against all types of corruption.⁶⁸ It is evident that these requirements fall outside the competence of the EU in relation to the Member States, as discussed in Chapter Two.

⁶² Accession Partnerships

<http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/index_en.htm> accessed 17 December 2007.

⁶³ OJ L85, 20.03.1998, at 1

⁶⁴ K Inglis, 'The Europe Agreements compared in the light of their pre-accession reorientation' (2000) *Common Market Law Review* 37, 1173-1210, at 1175.

⁶⁵ Council Decision of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Poland, OJ L 44/71, 14.2.2002.

⁶⁶ Council Decision of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Slovakia, OJ L44/92, 14.2.2002.

⁶⁷ Council Decision of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Lithuania, OJ L44/54, 14.2.2002.

⁶⁸ Council Decision of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Latvia, OJ L44/45, 14.2.2002.

For most of the CEE countries, the Accession Partnerships played a role as the 'key external driver of reform.'⁶⁹ Their effectiveness was enhanced by the fact that financial assistance under the PHARE programme was linked to the degree of achievement of the priorities established by the Accession Partnerships. Furthermore, the Accession Partnerships included an explicit conditionality clause, which stipulated that pre-accession aid depended on compliance with the Europe Agreements and progress in fulfilling the Copenhagen political criteria.⁷⁰ Hence, the incentive was strong for the CEE candidate countries to observe the priorities set out by the Commission.

In response to the Accession Partnerships, each of the candidate countries drew up a National Programme for the Adoption of the *Acquis*, which set out a timetable and a national strategy for achieving the relevant priorities and objectives. In addition to adopting these national strategies, the candidate countries also created institutions to facilitate their preparation for accession to the EU. For instance, they established inter-ministerial bodies – a council, commission or committee – to coordinate these preparations and European integration departments within government ministries or agencies.⁷¹

4. Impact of conditionality on domestic policies of the Central Eastern European countries

Considering the above conditionality tools, what potential did the EU have to affect the policy-making in the CEE countries? To separate the kinds of influence that the EU had on the candidate countries Vachudova distinguished between two types of leverage, including 'passive leverage' based on the attraction of EU membership and 'active

⁶⁹ Grabbe (n 54), at 16.

⁷⁰ Council (n 65), para 3.

⁷¹ M. Soveroski, 'Agenda 2000: Paving the Way for Enlargement?' in M. Soveroski (ed) *Agenda 2000: an appraisal of the Commission's Blueprint for Enlargement* (EIPA, The Netherlands, 1997), 5-19, at 8.

leverage' which relied on the deliberate conditionality exercised in the pre-accession process.⁷²

Initially, EU conditionality was limited and the EU did not play a decisive role in fostering reforms in the CEE countries. The political and economic 'Copenhagen criteria' were too general to trigger specific changes in the candidate countries. Corruption appeared neither in the 'Copenhagen criteria' nor in the Europe Agreements. Again, as already discussed in Chapter Two, before 1996 the EU also did not have any *acquis* directly addressing corruption, which could have been transposed by the candidate countries. At that time, the EU demands focused on implementation of the formal internal market *acquis*. In 1995 the Commission adopted the White Paper on the preparation of the CEE countries for integration into the internal market⁷³, which identified the key requirements for the candidate countries in this area. It was the first document that attempted to clarify the membership requirements.

The character of political change in the CEE countries immediately after 1989 depended mainly on domestic factors.⁷⁴ Even at that time, long before any formal application for EU membership, governments of the CEE countries were borrowing the standards of democracy from individual Western democracies, including in the area of anti-corruption policy. Thus, the anti-corruption reforms taking place in the CEE countries were part of a broader democratisation process, which was taking place independently from the desire to join the EU.

Since the launch of the pre-accession strategy by the Essen European Council in 1994, active leverage was used to reinforce domestic political changes. The EU constructed deliberate instruments to influence the domestic policies of the candidate countries. As Vachudova has argued, '... Western governments and EU officials started

⁷² Vachudova (n 13), at 63.

⁷³ Commission (EC), 'White Paper: Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union', COM (95) 163, 3.5.1995.

⁷⁴ Vachudova (n 13), at 98.

to abandon the norm in international politics of not interfering in the domestic affairs of other states.⁷⁵ The conditionality was reinforced with the adoption of the 1997 Opinions, and these policy documents gave the EU the opportunity to define the general 'Copenhagen criteria'. The most powerful conditionality tool was access to different stages in the accession process and the evaluation of general progress made by the candidate countries in the Regular Reports. The 1997 Opinions explained what is expected from the candidate countries under the political criteria, and corruption was explicitly recognised as an element of democracy and the rule of law. Since then, democratic conditionality in the area of anti-corruption gathered steam.

The EU started monitoring the adoption and implementation of many policies over which it had no say in relation to the Member States, including the reform of public administration, the modernisation and independence of judiciary and the development of anti-corruption policy. As Grabbe has noted, the scope of the accession agenda went beyond the influence of the EU in the governance of existing Member States.⁷⁶ Again, the accession requirements were non-negotiable for the candidate countries, and they had no choice but to accept that.

The CEE countries shared the conviction that there was no alternative to EU membership '...if future stability and prosperity were to be assured...'⁷⁷ At the same time, the candidate countries were more receptive to the standards and solutions imposed by the EU than existing Member States ever were. Because the accession process coexisted with the political transformation, the CEE countries were seeking new institutional models and guidance, and the EU was offering that. The desire to join the EU was such that even where the conditions imposed did nothing to enhance domestic

⁷⁵ Ibid, at 103.

⁷⁶ Grabbe (n 27), at 1015.

⁷⁷ C. Pinelli, 'Conditionality and Enlargement in Light of EU Constitutional Developments' (2004) *European Law Journal*, Vol. 10No. 3, 354-362, at 357-358.

performance, they may have still been accepted simply because they were conditions for membership.⁷⁸

An important question to ask is whether preparations to join the EU went together with the needs of political and economic transition in CEE countries. The EU policies and *acquis* were developed for the needs of Member States that were at a more advanced stage of economic and political development than the candidate countries. The content of *acquis* reflected the degree of integration among the Member States and was not designed for the needs of countries undergoing economic and political transition. Some authors even argue that due to regulation in a number of public policy areas, EU membership can have negative consequences on attempts to reduce the size of government in the CEE countries and therefore increase the risk of corruption.⁷⁹

As demonstrated in Chapter Three, in the area of anti-corruption, with few exceptions, there was almost no *acquis* that could help the CEE countries in constructing their national anti-corruption programmes. Therefore, as Chapter Six will discuss, the Commission had to devise a new policy that could assist the candidate countries in their anti-corruption efforts.

Because the membership conditions were so broad and covered almost every aspect of public policy, EU pressure during the pre-accession process helped to strengthen the democratic and economic transition in the CEE countries. The process of accession to the EU and the pressure to conform with the EU membership conditions led to the emergence of, as Dimitrova and Pridham called it, a unique model of democracy promotion through integration.⁸⁰ Using the Regular Reports and Accession Partnerships, the EU identified poor performance in the conception and execution of reforms and

⁷⁸ S. Rose-Ackerman, 'From Elections to Democracy: Building Accountable Government in Hungary and Poland' (CUP 2005), at 38.

⁷⁹ M.L. Tupy, 'The Rise of Populist Parties in Central Europe. Big Government, Corruption, and the Threat to Liberalism' (2006) CATO Institute, Centre for Global Liberty & Prosperity Development Policy Analysis, No. 1, at 18 <<http://www.cato.org/pubs/dpa/dpa1.pdf>> accessed 6 December 2007.

⁸⁰ Dimitrova and Pridham (n 9), at 94.

made the environment for abusing or neglecting such reforms less permissive.⁸¹ The desire to join the EU committed the governments of the CEE countries to ongoing reforms. Vachudova points at judiciary and civil service reforms as the areas where the pressure from the EU was crucial and forced the governments to conduct the reforms.⁸²

Conclusion

This chapter observed that the EU deliberately developed mechanisms to promote domestic policy changes in the CEE candidate countries. However, the EU did not use a chance to emphasise the problem of corruption early in the accession process. It did not include the fight against corruption in the 'Copenhagen criteria' and link the progress in combating corruption to the fulfilment of political criteria in the 1997 Opinions. The need to fight against corruption became an explicit condition of accession only in 1997. Subsequently, despite of the lack of the relevant competence in relation to Member States, the EU evaluated the progress in the fight against corruption within the CEE countries.

Since 1997, the EU used its powerful conditionality tools to promote and evaluate the anti-corruption efforts in the candidate countries. The Accession Partnerships and the Regular Report gave the EU the possibility to directly influence and shape the policy making in the CEE countries. The rule was simple: these instruments indicated priorities that had to be implemented as part of the preparations for accession to the EU. The Accession Partnerships gave the EU control on the direction of reforms and transformation in the CEE countries. On the basis of each Accession Partnership, the Council had power to sanction a candidate country by reducing or suspending the pre-accession financial assistance.

⁸¹ Vachudova (n 13), at 186.

⁸² Ibid, at 187.

The potential of the EU to influence the anti-corruption policies of the CEE countries was great. The candidate countries were ready to accept the far-reaching demands of the EU and interference in their internal affairs. It was also in the EU vital interest to make sure that candidates fully complied with the membership requirements before accession. At the same time, the benefits of membership were so huge that the candidate countries were ready to conduct necessary reforms to access the next stage of the negotiation process.

It has been pointed out that 'the substantial benefits combined with the enormous requirements of membership have afforded the EU unprecedented leverage on the domestic politics of candidate countries.'⁸³ This chapter outlined the potential of the EU and presented the tools available to influence the policies of the candidate countries. Now the crucial question is whether the EU used conditionality instruments to instigate the candidate countries to high anti-corruption standards. This will be discussed in Chapters Five and Six. Chapter Five starts this discussion by explaining how the EU evaluated the problem of corruption and whether corruption in the CEE countries was seen as a serious problem from the EU point of view.

⁸³ Ibid, at 108.

The EU's evaluation of corruption in the Central and Eastern European candidate countries

The international survey evidence presented in Chapter One suggested that corruption in the CEE countries constituted a serious problem that required an immediate and decisive response. This chapter analyses how the EU evaluated the nature and extent of corruption within the candidate countries. It is important, however, to put this analysis into a broader context. In particular, as Chapters Two and Three argued, the EU does not have the competence to monitor the general progress of Member States in their efforts to prevent and combat corruption, and even the mechanisms for monitoring the implementation of EU anti-corruption instruments are fragmentary and highly ineffective. Therefore, for the purposes of enlargement, the EU had to develop new mechanisms to evaluate the progress of the candidate countries in this area in a broader and more rigorous way.

This chapter discusses and assesses these mechanisms. To this end, the chapter is divided into two main sections. The first section has a largely descriptive character and analyses and contrasts the evaluations carried out by different bodies within the EU. As there is little secondary literature in this area, this section builds predominantly on primary sources of information, including various documents of the Commission and the Council. Some of the Council's documents were not public documents, but they were declassified at the request of the author.

The second section focuses on the assessment of the methodology and mechanisms employed by the EU. It examines the strengths and weaknesses of the EU instruments. In particular, EU activities are evaluated in the light of international monitoring mechanisms, which were already discussed in Chapter One.

1. The importance of evaluation

A coherent anti-corruption strategy needs to be based on a thorough analysis of the causes and patterns of corruption in a given society. In order to bring best results, it should be tailored to the local circumstances and the specific needs of individual countries. The anti-corruption strategy should take into account several important factors, including which sectors are most vulnerable to corruption and why; whether corruption is induced by public officials or individuals; and officials of what ranks engage in corrupt practices most often? The more comprehensive and detailed the evaluation of factors underlying corruption, the more effective and coherent the strategy against it will be possible. As the World Bank observed:

An effective strategy for anticorruption must be based on an understanding of the root causes of different forms of corruption and their variation. Without it, policymakers run the risk of treating the symptoms without remedying the underlying conditions.¹

¹ The World Bank, 'Anticorruption in Transition: A Contribution to a Policy Debate' (2000), at xix <<http://www.worldbank.org/wbi/governance/pdf/contribution.pdf>> accessed 7 December 2007.

Chapter One observed that the fight against corruption in the CEE countries posed a particularly difficult challenge. The nature of corruption in these countries resulted from the communist period and its complex social and political conditions. Any effective policy against corruption within these countries must take these complexities into account. For example, as already observed in Chapter One, corrupt practices in the CEE countries were related to the clientelistic structures within post-communist societies. Thus, an anti-corruption strategy for these countries cannot be separated from an understanding of clientelism. This approach has been reflected in the World Bank studies on the nature of corruption in the post-communist countries, which found that:

Confronting corruption in transition countries requires a more complex approach that recognizes the diverse factors underlying the persistence of corruption and provides a foundation for tailoring strategies to the particular contours of the problem in different countries.²

The OSI report in 2002 also warned about the dangers of the generalizing the treatment of corruption in the post-communist countries. In particular, it argued that:

While the existence of common factors underlying corruption in post-communist countries is undeniable, it is important to avoid the assumption that corruption in all post-communist countries is the same and therefore requires the same solutions. The major cultural variation among EU member States is not unique. Cultural, historical and other differences among Central and East European countries are also large, and are reflected in differences in the extent and nature of corruption. ... These differences suggest that beyond the establishment of certain basic minimums, there is a need for solutions specific to individual countries; however, to date very little, if any, research has been conducted in this area.³

This does not mean that it is not possible to agree certain principles that should underpin every anti-corruption strategy. At the pan-European level, such a set of principles exists in the form of the Council of Europe Twenty Guiding Principles against corruption (See: Appendix 1). These principles, however, are deliberately very general

² Ibid, at xv.

³ Open Society Institute, 'Monitoring the EU Accession Process: Corruption and Anti-Corruption Policy', 2002, at 45 (OSI Report) <<http://www.eumap.org/reports/2002/corruption>> accessed 7 December 2007.

so that they can provide an anti-corruption framework for a large number of countries. If corruption is to be tackled effectively, the policy must move beyond these generalizations and formulate very specific responses to the individual needs of every country. Research in this area has confirmed that the so called one-size-fits-all approaches that apply common policies and tools to countries in which acts of corruption and the quality of governance vary widely are likely to fail.⁴ Indeed, anti-corruption measures that work well in one country might not be good enough for another country. For example, raising salaries for judges may diminish the problem of corruption in some countries, but in post-communist countries it would bring limited results if not accompanied by a comprehensive reform of judicial structures and an increase in accountability standards.

As argued in Chapter Four, the accession process gave the EU a unique capacity to influence the domestic policy-making processes across the CEE countries. The EU did not have to limit its strategy to broad principles, but it could formulate very specific demands in the area of anti-corruption. The ability to do that depended, however, on the quality of the EU's evaluation of the causes and nature of corruption within the candidate countries.

2. The pre-accession institutions and mechanisms of evaluation

There were numerous opportunities within the pre-accession process to collect information on the extent and treatment of corruption within the CEE countries. The first such occasion was during the screening process, when the Commission and the candidate countries were examining the compatibility of national legislation with the *acquis*. The screening process was, however, very limited and did not allow the Commission to see a broader picture of the problem of corruption within the candidate countries. It focussed narrowly on reviewing the compatibility of the national legislation

⁴ A. Shah, 'Tailoring the Fight against Corruption to Country Circumstances' in A. Shah (ed) *Performance Accountability and Combating Corruption* (Public Sector Governance and Accountability Series, The World Bank 2007), 233-253, at 236.

with only the formal EU anti-corruption *acquis*, which as argued in Chapter Three had a very narrow scope.

Throughout the pre-accession process, the EU had further opportunities to receive information in a more systematic way during the regular meeting between JHA ministers of the Member States and the candidate countries. These meetings provided an opportunity for an on-going discussion on the progress of the candidate countries in the implementation and application of the *acquis* in the area of JHA.⁵ However, the fact that only the governments of the candidate countries took part in these meeting impaired the reliability of information. It was in the best interest of the national governments to present the situation in their countries in the best possible light so as not to hinder the pace of the accession process. Therefore, even if corruption within a given candidate country impaired the proper implementation of the *acquis*, the national governments were likely to keep that to themselves.

Most importantly, however, the EU developed new institutions and policy instruments specifically to monitor the progress of the candidate countries in their anti-corruption efforts. These assessments were conducted by two groups. Within the Commission, they were carried out by the Directorate General (DG) Enlargement, which prepared the 1997 Opinions and the Regular Reports. Within the Council, they were prepared by a special group of experts, known as the Collective Evaluation Working Party (CEWP).

⁵ For example: Presidency Secretariat, Ministry of Justice, 'Informal JHA-Ministerial Meeting, Copenhagen' Background Papers 13-14 September 2002
<www.statewatch.org/news/2002/sep/JHAbackground5.pdf> accessed 7 December 2007.

2.1. Evaluation within the Commission

2.1.1. The 1997 Opinions

As discussed in Chapter Four, the Commission recognised the fight against corruption as a membership condition in the 1997 Opinions, where it also gave its first assessment of the problem of corruption within the CEE countries. All the Opinions follow the same structure to ensure the objective and fair assessment of all the candidate countries.⁶ Corruption was assessed under the section evaluating the standards of democracy and the rule of law in the candidate countries. All the Opinions drew on the same sources of information, including data from the countries concerned, which was collected by means of questionnaires, bilateral follow-up meetings and reports from Member States' embassies, the Commission's delegations, NGOs and other international organisations such as the Council of Europe and the Organization for Security and Cooperation in Europe.⁷

The Opinions mentioned the problem of corruption in each of the eight CEE candidate countries. The general conclusion was that efforts to fight corruption needed to be intensified, especially in regard to the police, the judiciary and customs officials. In the Opinions for all countries except for Estonia, the Commission gave its initial assessment of the extent of corruption, but only did so in very general terms. (See Table 5.1)

⁶ DOC/97/17 Czech Republic; DOC/97/12 Estonia; DOC/97/13 Hungary; DOC/97/14 Latvia; DOC/97/15 Lithuania; DOC/97/16 Poland; DOC/97/20 Slovakia DOC/97/19 Slovenia
<http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/index_en.htm> accessed 7 December 2007.

⁷ For example: Commission (EC), 'Agenda 2000- Commission Opinion on Latvia's Application for Membership in the European Union', 15 July 1997
<http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/latvia/la-op_en.pdf> accessed 7 December 2007.

Table 5.1: Evaluation of corruption in the Opinions of July 1997

Candidate Country	Evaluation of corruption
Czech Republic	present in the system and may be increasing
Estonia	
Hungary	a number of cases of corruption in the Hungarian police
Latvia	significant and widespread problem of corruption in the public administration
Lithuania	severe problems with corruption in the customs administration
Poland	corruption remains a source of concern
Slovakia	petty corruption is not uncommon country is experiencing problems with corruption
Slovenia	no evidence of significant corruption.

Source: Commission (EC), 'Agenda 2000, Opinions on Application for Membership of the European Union' (1997)

http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/index_en.htm accessed 7 December 2007

From the above chart, it is evident that the initial evaluation of the extent of corruption was scant and fragmentary. The Commission did not follow a consistent approach across the CEE countries and the Opinions did not contain any further clarification of what 'severe problems', 'source of concern' or 'widespread' meant.

Even more worryingly, some of the assessments suggested that the governments of the candidate countries influenced the final text of the Opinions. For example, the Opinion on Latvia concluded that 'the present government has made the fight against corruption one of its priorities.'⁸ Similarly, in the Opinion on Lithuania the Commission emphasised that 'eradicating corruption in the public administration is a high priority of the present government'⁹ and the Opinion on Poland stated that 'corruption exists; but where it occurs it is frequently exposed and attacked'.¹⁰ The fact that national

⁸ Commission (EC), 'Agenda 2000- Commission Opinion on Latvia's Application for Membership in the European Union', 15 July 1997 <http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/latvia/la-op_en.pdf> accessed 7 December 2007.

⁹ Commission (EC), 'Agenda 2000- Commission Opinion on Lithuania's Application for Membership in the European Union', 15 July 1997 <http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/lithuania/li-op_en.pdf> accessed 7 December 2007.

¹⁰ Commission (EC), 'Agenda 2000- Commission Opinion on Poland's Application for Membership in the European Union', 15 July 1997

governments were directly involved in the preparations of the Opinions did not guarantee a reliable and accurate assessment. As already mentioned above, it was in the interest of the governments of the CEE countries to present the situation in the best possible light.

2.1.2. The Regular Reports

As explained in Chapter Four, from 1998 until 2003 the Commission published the annual Regular Reports, which reviewed the progress made by all the candidate countries in meeting the membership criteria.¹¹ These Regular Reports were the main instrument to assess the preparations of candidate countries in advance of EU membership. They each contained a section specifically evaluating the anti-corruption measures taken by the individual candidate country. This mainly described which measures had been taken by the governments to tackle corruption and analysed the existing anti-corruption legal and institutional framework. An analysis of the Regular Reports provides insight into how much attention the EU attached to the problem of corruption over time.

The Regular Reports drew on similar sources of information as the 1997 Opinions. The aim was to use as many sources as possible.¹² However, the Commission relied to a large extent on the assessments by international organisations. Among these, the GRECO evaluations were the most valuable for the Commission.¹³ Meanwhile, the fact that governments of candidate countries remained one of the leading providers of information undermined their independence and reliability and, as Maresceau observed,

<http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/poland/po-op_en.pdf> accessed 7 December 2007.

¹¹ Regular Reports

<http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/index_en.htm> accessed 7 December 2007.

¹² N. Kontou, DG Enlargement, Statement at the conference 'The impact of Enlargement on Evolving Standards for Anti-corruption Policy and Judicial Reform in the EU' (Centre for European Policy Studies, 6 October 2002) <http://www.ceps.be/Article.php?article_id=88> accessed 7 December 2007.

¹³ Interview with Sabine Zwaenepoel, European Commission, Directorate-General Justice, Freedom and Security (Brussels, 29 November 2006).

the Commission's reporting on particular issues gave the impression of being 'coloured'.¹⁴

It is important to note that the Commission did not specify at any point during the accession process what definition of corruption it adopted for the purposes of evaluation. As observed in Chapter One, there are two definitions of corruption accepted at the EU level: a narrow criminal-law definition of corruption as bribery and a broader concept of corruption as 'an abuse of power for private gain' developed for prevention policy purposes. From the analysis of recommendations made to the candidate countries, which will be discussed in detail in Chapter Six, it can be deduced that the Commission's evaluation was not limited to the narrow criminal law definition of corruption, but rather it measured corruption understood in a broader way.

As already discussed in Chapter Four, the evaluation in the Regular Reports was conducted in line with the principle that each country should be assessed on the basis of the same criteria. As the Commission explained, 'this process of regular evaluation based on unchanging criteria is the only way to make a fair and balanced assessment of the real capability of each candidate country to meet the Copenhagen criteria'.¹⁵ The adoption of such a fair approach is understandable and should be reflected in every monitoring system. Most importantly, however, the criteria of assessment must be communicated in a clear way. As observed in Chapter One, all international monitoring systems evaluate countries according to specific pre-determined indices in the form of conventions or a set of recommendations. The Commission's evaluations were characterised by the lack of a set of clear criteria, which will be discussed in more detail in Chapter Six.

¹⁴ M. Maresceau, 'Pre-Accession' in M. Cremona (ed) *The Enlargement of the European Union* (OUP 2003), 9-42, at 34.

¹⁵ Commission (EC), 'Composite Paper' (1999), at 13
<http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/composite_en.pdf> accessed 7 December 2007.

The Commission evaluated the extent of corruption at both national level and across the CEE countries. Each year it prepared a composite paper that contained a synthesis of the analysis in each of the Regular Reports. The first composite paper in 1998 mentioned corruption very briefly:

The fight against corruption needs to be strengthened further. The efforts undertaken by the candidate countries are not always commensurate with the gravity of the problem. Although a number of countries are putting in place new programmes on control and prevention, it is too early to assess the effectiveness of such measures. There is a certain lack of determination to confront the issue and to root out corruption in most of the candidate countries.¹⁶

In subsequent years, the general assessments of corruption were very similar to the one above, and the composite reports described corruption across the candidate countries as a 'matter of serious concern'¹⁷ and 'widespread.'¹⁸ One report stated that 'the perception remains that the level of corruption in the acceding countries is still high, and very high in some cases...'¹⁹, without providing any evidence in support of these claims. However, it is apparent that in the Commission's assessment, corruption in the CEE countries remained a serious problem from the beginning until the end of the accession process.

While the composite reports were only a synthesis of the problem, the individual country reports discussed the situation in each of the candidate countries in greater detail. The first Regular Reports in 1998 did form judgments about the extent of corruption and highlighted the need to intensify the fight against it. In subsequent reports, the Commission formulated more detailed assessments of the prevalence of

¹⁶ Commission (EC), 'Composite Paper' (1998), at 4
<http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/composite_en.pdf> accessed 7 December 2007.

¹⁷ Commission (EC), 'Enlargement Strategy Paper' (2000), at 16
<http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/strat_en.pdf> accessed 7 December 2007.

¹⁸ Commission (EC), 'Composite Paper' (1999), at 15 and (2001), at 10
<http://ec.europa.eu/enlargement/archives/key_documents/reports_1999_en.htm#2.%20Composite%20Paper> accessed 7 December 2007.

¹⁹ Commission (EC), 'Comprehensive Monitoring Report' (2003), at 7
<http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0675en01.pdf> accessed 7 December 2007.

corruption, typically focussing on the police, the judiciary, customs officials and public administration. The Commission repeatedly classified corruption as ranging from 'widespread' through 'cause for concern', 'serious problem' or 'significant problem' to a 'relatively limited problem'. (See Table 5.2)

Table 5.2: Evaluation of corruption in the Regular Reports 1999-2003

Candidate Country	1999 Regular Reports	2000 Regular Reports	2001 Regular Reports	2002 Regular Reports	2003 Regular Reports
Czech Republic	a serious problem including in the public sector at both central and regional levels	continues to be a problem	a serious cause for concern; consistent increase in the perception of corruption	a cause for serious concern; public administration bribery continues to be significant problem; latent corruption is still widespread	a cause for concern
Estonia	within the police still persist	a relatively limited problem	a relatively limited problem	generally appears to remain a relatively limited problem	remains at a relatively low level
Hungary	problems with corruption	remains a problem	remains a problem	a cause for concern; remains a problem	represent a serious problem; perceived as a relatively widespread
Latvia	a serious problem with corruption	a serious obstacle to the proper and efficient functioning of the public administration	a source of concern; the perceived level of corruption continues to be relatively high	a cause for serious concern	still remains a concern
Lithuania		a source of concern	an area of concern	a cause for concern	a source of concern
Poland	in the Police force, whilst widespread, is essentially currently confined to the lower ranks	across public administration as well as across Polish society at large has reached a high level; environment in which corruption can flourish; a serious problem	a source of serious concern	a cause for serious concern; culture which cannot resist corruption	the perception of corruption by the public is high; perceived to be increasing from an already relatively high level in Poland; affects all spheres of public life
Slovakia		relatively widespread	a serious problem; perception that it is still widespread; a serious cause for concern.	a cause for serious concern	widespread; the public awareness of the need to fight corruption, including in the media is increasing; remains a cause for concern.
Slovenia	still relatively limited	relatively limited in Slovenia	appears to remain relatively limited	appears to be a rather limited problem; public perception seems to regard corruption as more widespread than shown by official statistics; no major cases of corruption have been detected	appears to be a rather limited problem; public perception seems to regard corruption as more widespread than shown by official statistics; no major corruption cases have been detected recently

Source: Commission (EC), Regular Reports

<http://ec.europa.eu/enlargement/archives/key_documents/reports_1998_en.htm> accessed 7 December 2007

The analysis contained in the Regular Reports represented only a synthesis of all the information that the Commission had at its disposal. As mentioned earlier, the Commission based the Regular Reports mainly on secondary sources of information prepared by other agencies. Although it formulated judgements about the prevalence of corruption in candidate countries, it did not support it with clear evidence. Therefore, each assessment appeared to be more intuitive rather than based on facts. The OSI report, which analysed the sources of information used by the Commission, concluded that three main criteria were used to assess corruption: criminal statistics, public opinion surveys and other unspecified evidence such as the 'general perception' or 'persistent rumours'.²⁰ Moreover, the Commission did not employ a consistent approach across candidate countries when citing survey data. For example, in some cases it interpreted high crime statistics as an indication of actual levels of corruption, but in other cases high crime statistics were presented as proof of the strength of the fight against corruption.²¹

The Regular Reports were drafted with the use of careful diplomatic language. Was the acceptance of such a formulaic and cautious approach appropriate? Due to the great political importance of the Regular Reports, even small differences in their wording were broadly analysed and interpreted by the candidate countries. It is also interesting to note that, as Vachudova observed, while the officials from the candidate states may have found factual mistakes or may have disagreed with the interpretation of a particular passage in the Commission's Opinions and Regular Reports, in general they accepted the logic and the overall fairness of the process.²²

The use of more decisive language supported by more precise evidence would, however, have brought significant advantages. It would have sent a clearer message to the governments of the candidate countries that they needed to continue with their

²⁰ OSI Report (n 3), at 46- 51.

²¹ Ibid, at 49.

²² M.A. Vachudova, *Europe Undivided - Democracy, Leverage, and Integration After Communism* (OUP 2005), at 113.

efforts to root out corruption. Furthermore, a more careful examination of corruption by the Commission would have helped to focus the candidate countries better on the domains which required immediate response. It would also have mobilised the media and non-governmental organisations within the country concerned, increasing the pressure on the national government to act.

Unfortunately, the Commission could not use such decisive language. It was hamstrung by the lack of similar policy against corruption within the Member States. It could not strongly criticise the governments of the candidate countries and at the same time tolerate cases of corruption within its existing members. Therefore, it should not be too surprising that despite repeated critical assessments, in the Commission's view all the candidate countries fulfilled the Copenhagen political criteria.

It is important to emphasise that the last Regular Reports in 2003, which identified corruption as a serious problem in all CEE countries except for Estonia and Slovenia, were published after the Treaty of Accession²³ was signed. Therefore, one may conclude that the criticism of the Commission in this area did not have an impact on the pace of the accession process, and despite its importance, corruption was not seen as an obstacle to accession.

2.2. Evaluation within the Council

As observed in Chapter Three, most of the anti-corruption instruments were adopted under Title VI of EU Treaty and for the purposes of accession negotiations were part of the *acquis* in the field of JHA.²⁴ As a result, the progress made by the candidate countries in their fight against corruption was assessed in the framework of a more general evaluation in the field of JHA. Alongside the Commission, the Member States also increased their efforts to monitor the progress made by the candidate countries in

²³ OJ L 236/17, 23.09.2003.

²⁴ Council of the European Union, 'Enlargement process-Acquis in the field of Justice and Home Affairs for 2000' 10637/01, 6 July 2001.

the adoption of the *acquis* in the area of JHA. As Monar observed, the Member States became increasingly concerned about the practical implementation of the *acquis* in the area of JHA by the candidate countries and even took the view that the Commission was not paying enough attention to implementation problems in its monitoring work.²⁵ These concerns over the candidate countries' potential implementation deficits were actually the main reason for the establishment within the Council of a special mechanism for the collective evaluation of the *acquis* in JHA.²⁶

This evaluation took place on the basis of the Joint Action of 29 June 1998.²⁷ Article 2 of the Joint Action provided for the establishment of a group of experts from the Member States under the supervision of the Council's Committee of Permanent Representatives of the Member States (COREPER) with the task of preparing and keeping up-to-date collective evaluations of the situation in the candidate countries on the enactment, application and effective implementation of the *acquis*. This group of experts, known as the Collective Evaluation Working Party (CEWP), enabled the EU and the Member States to pool their expertise to help evaluate the candidate countries.²⁸ As in the case of the Commission's Regular Report, the aim of the CEWP reports was to deliver a uniform, fair and accurate assessment of each candidate country. To this end the CEWP could collect information drawing on relevant reports or, if necessary, organise *ad hoc* teams of experts from Member States and the Commission to carry out a mission on specific aspects, without, however, overburdening the candidate countries.²⁹

²⁵ J. Monar, 'EU Justice and Home Affairs in the Eastward Enlargement: The Challenge of Diversity and EU Instruments and Strategies' (2001) ZEI Discussion Paper C 91, at 19
<http://www.zei.de/download/zei_dp/dp_c91_monar.pdf> accessed 8 December 2007

²⁶ Ibid.

²⁷ Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanisms for collective evaluation of the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of Justice and Home Affairs, 98/429/JHA, OJ L 191/8, 7.7.1998

²⁸ Council of the European Union, 'Enlargement: Progress reports by the Working Party on Collective Evaluation and the Working Party on Enlargement' 12216/00, 11 October 2000.

²⁹ Article 3 of the Joint Action 98/429/JHA

While the Regular Reports were ‘...limited to the broad lines of progress and persisting deficits...’, the reports of the CEWP ‘...reached significantly more systematic and sophisticated stage’³⁰ The CEWP reports focused on areas where the most serious shortcomings existed as well as on administrative capacity and implementation of the *acquis* in the area of JHA.³¹ Apart from looking at the formal implementation of the *acquis*, a key aim of the CEWP evaluation process was the assessment of actual practice in the countries concerned, including practical effects on the organisation and resources of authorities and institutions.³² This approach to evaluation was in line with the argument made by Tulmets that ‘the sector of justice and home affairs requires not so much legislative measures, but technical investments and training of people, the efficiency of which is difficult to measure’.³³

The evaluations carried out by the CEWP covered 12 candidate countries, including all eight CEE countries, Malta, Cyprus, Romania and Bulgaria. The CEWP reports are confidential. Access to the individual country reports was refused by the Council, as ‘the unauthorised disclosure could be disadvantageous to the interests of the EU or one or more of its Member States’.³⁴ As the General Secretariat of the Council explained, ‘any shortcomings in the transposition and application of the *acquis* were discussed in an atmosphere of mutual trust and information was often given on a confidential basis’, and the disclosure of this information ‘could jeopardise future evaluation procedures both within the EU and in relation to new candidate countries and some information could also enable criminals to determine the capacity of the Member States to combat certain forms of crime’.³⁵ Nevertheless, it is still feasible to outline the

³⁰ J. Monar, ‘Justice and Home Affairs’ (2001) *Journal of Common Market Studies*, Supplement Vol. 39 No. 3, 121-137, at 136.

³¹ Council of the European Union, ‘Enlargement: statement by the Collective Evaluation Working Party’ 14892/03, 17 November 2003.

³² Council of the European Union, 10543/99, 14 September 1999.

³³ E. Tulmets, ‘The Management of New Forms of Governance by Former Accession Countries of the European Union: Institutional Twinning in Estonia and Hungary’ (2005) *European Law Journal*, Vol.11, No. 5, 657-674, at 669.

³⁴ General Secretariat of the Council of the European Union (Personal email correspondence 22 May 2006).

³⁵ *Ibid.*

general structure of these reports. From the available disclosed documents, it is possible to reconstruct the methodology followed and sources of information used by the CEWP in assessing the extent of corruption within the candidate countries.

2.2.1. Methodology

The CEWP adopted two approaches in its evaluation process: a country by country and a thematic approach. For this purpose, the *acquis* in the field of JHA was divided into five areas: asylum, migration, border management, police co-operation and judicial co-operation.³⁶ Among the documents available to the public, there are two preliminary draft reports on the Czech Republic and Hungary³⁷, which suggest that in 2000 the CEWP reports were divided into three sections: 'border controls, asylum and immigration', 'police and customs' and 'justice'.

The analysis of the CEWP was organised in accordance with a 'structured checklist'³⁸, which outlined the key issues addressed in the country reports. It is evident that corruption was to some extent evaluated from the beginning of the CEWP activities. The text of the 'structured checklist' from 1999 allows for examination of the contexts in which corruption appears in these reports. First, the CEWP was asked to establish, with the use of statistics on the number of proceedings and convictions, whether corruption constituted a problem in the border security forces.³⁹ Second, the CEWP focused on the extent of the actual problem of corruption within the police and customs administration of the candidate countries, which involved collecting information not only on the number of prosecutions and preventive measures, but also on the salary levels of the police compared to the general salary level in the society, as well as the economic ties and second jobs of policemen.⁴⁰ The CEWP was also given the sensitive

³⁶ Council (n 32).

³⁷ Council of the European Union, 'Collective evaluation: preliminary draft reports on the Czech Republic and Hungary' 6613/00, 23 March 2000.

³⁸ Council of the European Union, 'Structured checklist' 5322/3/99, 29 April 1999.

³⁹ Ibid, at 4.

⁴⁰ Ibid, at 19-25.

task of establishing whether there was any political influence exerted on the police within the candidate countries.⁴¹

After these initial evaluations, corruption received special attention from 2000 onwards. The CEWP perceived corruption as a major problem affecting all the candidate countries, and in 2000, upon the initiative of the French Presidency, the CEWP decided to launch a study on corruption in Central and Eastern Europe.⁴² The aim of the study was to provide a more comprehensive view of the situation in the candidate countries with regard to corruption and its impact.⁴³ This initiative did not take the form of a separate study, but instead, the subject of corruption was dealt with in a separate chapter in each and every individual country report on the candidate countries.⁴⁴ The Council acknowledged that before 2000 the examination of corruption at the EU level was limited to description of the legislative and administrative structures and emphasised that the task of the CEWP was to deliver a more 'down-to-earth' analysis of the problem.⁴⁵ With the objective of showing the scale and practical impact of corruption within the candidate countries, the study began with an analysis of corruption in the public administration, in particular in the police, customs and judiciary.

The work started with preparation of a situation chart to clarify the anti-corruption efforts in each candidate country, including: the existence of any anti-corruption legislation or programme, ratification of the Council of Europe and the OECD anti-corruption instruments, and membership in the Task-Force on Organised Crime in the Baltic Sea Region⁴⁶ and GRECO.⁴⁷ Additionally, the chart took into

⁴¹ Ibid, at 20.

⁴² Council of the European Union, 'Corruption' 12658/00, 9 November 2000.

⁴³ Ibid.

⁴⁴ L. Bot, Member in charge of the CEWP, Council of the European Union. Question (Personal email correspondence 30 March 2006).

⁴⁵ Council of the European Union, 'Examination of corruption in the applicant countries:-Thoughts on methods' 10727/00, 27 July 2000.

⁴⁶ The Task-Force was established in 1996 and has the mandate to monitor corruption in the Baltic Sea Region, including Poland, Latvia, Lithuania and Estonia. The European Commission and Europol have an observer status. For more, see:

<<http://www.balticseatactforce.ee>> last accessed 17 December 2007.

account each country's rank and score in the Transparency International CPI and all the existing comprehensive reports on the subject prepared by the other agencies.⁴⁸ At the same time, however, the CEWP was aware that none of the indicators were capable of giving a full assessment of corruption in a given country, but it made an assumption that the legal provisions and organisational structures to fight corruption, combined with statistics on revealed, investigated and prosecuted cases as well as court convictions related to corruption behaviour, could indicate the determination of a country's government and its authorities to fight it successfully.⁴⁹

The CEWP developed a separate methodology for the evaluation of corruption in the candidate countries.⁵⁰ The task was to prepare and keep up-to-date evaluations of the situation and continuously collect information on corruption in the candidate countries from all relevant sources, analyse it and establish comprehensive findings. To this end, the work concentrated on the international dimension of corruption linked to organised crime and money laundering, the capacity of candidate countries to take effective measures to fight corruption of all kinds and the evaluation of the extent of 'street level' corruption.⁵¹

It is evident that the work within the Council extended beyond the mere evaluation of the correct implementation of the anti-corruption *acquis*. The focus was also on identifying the causes and extent of corruption within the CEE countries. In its work, the CEWP aimed to collect and analyse all relevant existing information from 'any available source.'⁵² This was a similar approach to the one taken during the preparations of the Regular Reports.⁵³ To begin with, the CEWP was asked to analyse

⁴⁷ Council of the European Union, 'Inventory of existing material on corruption' 13278/00, 15 November 2000, see: Annex.

⁴⁸ Ibid.

⁴⁹ Council of the European Union, 'Thematic paper on corruption' 11412/00, 15 September 2000.

⁵⁰ Council (n 42).

⁵¹ Ibid.

⁵² Council (n 32) and Article 3 of the Joint Action 98/429/JHA.

⁵³ As confirmed during the interview with Sabine Zwaenepoel, European Commission, Directorate-General Justice, Freedom and Security (Brussels 29 November 2006).

information gathered within the Council's various working parties and data collected during screenings and negotiations. Most importantly, however, the CEWP developed questionnaires addressed to agencies that could provide information on corruption from every possible angle, including the Council of Europe, the OECD, the UN, NGOs, the Member States' ministries, Europol, Interpol, the International Monetary Fund, the World Bank, and the relevant Bar Associations and accounting companies.⁵⁴

As Chapters Two and Three observed, the premise of the EU policy against corruption is to build on and take advantage of other international developments in this area. This conviction was also reflected in the works of the CEWP. It was emphasised that the evaluations carried out by the CEWP should avoid overlaps with and prejudice to existing international initiatives, thus limiting the scope of work to areas not already dealt with by other agencies.⁵⁵ As a result, the CEWP took into account the work carried out by other agencies, in particular GRECO and the OECD WG. As will be explained in Chapter Six, the anti-corruption conventions of these organisations were also part of the accession *acquis* in JHA that the candidate countries had to adopt before accession. Therefore, their reports were relevant for an appropriate assessment of the implementation of the *acquis*.

The main sources of information used by the CEWP, however, were the Member States' embassies and the Commission's delegations in the candidate countries. The idea was that the embassies and the Commission's delegations would work together and use their personal contacts in order to deliver the most accurate and up-to-date data. Embassies of the Member States were expected to answer the CEWP questionnaires collectively along with the other Member States' embassies and the Commission delegation in the respective country.⁵⁶ They were asked to provide non-statistical information about the general crime situation and give their own assessment about the

⁵⁴ Council (n 49).

⁵⁵ Council (n 47), at 1.

⁵⁶ Council of the European Union, 'Collective Evaluation of the implementation of the *acquis* of EU in the field of Justice and Home Affairs in Hungary, Poland and Romania' 5430/99, 21 January 1999.

impact of organised crime on the state and society, including comments about money laundering.⁵⁷ In addition, the CEWP expected them to gather information on the public's feeling about corruption, the citizens' trust to judiciary and deliver the latest texts of anti-corruption legislation and information about structure, organisation and competences of the anti-corruption law enforcement agencies.⁵⁸ It showed the Council's intention to gather the most accurate data and uncover what was behind the official statistics.

It is important to emphasise that among the possible addressees of this questionnaire, there were no governments of candidate countries. This did not mean, however, that they were not at all involved in the CEWP evaluation process. The CEWP used all kinds of reports, including those originating from the candidate countries' government services. In addition, the CEWP visited the candidate countries' missions and embassies in Brussels to explain what it was doing and asked, or accepted the offer, to assist in obtaining the relevant documentation.⁵⁹ As a member of the CEWP explained, 'we were reticent since we thought it was kind of odd/embarrassing if a candidate country would be asked to cooperate in an exercise such as this one, aimed at pinpointing the weak points and shortcomings in its efforts to correctly implement the *acquis*, especially since they had no right to see the report after.'⁶⁰

The text of the first questionnaire used as a basis for the CEWP reports concentrated only on three areas: border management, police and customs and justice.⁶¹ Thus it aimed at getting a detailed picture of each sector's situation using the questionnaire listed in Table 5.3.

⁵⁷ Council of the European Union, 'Collective Evaluation of the implementation of the *acquis* of EU in the field of Police and Judicial Cooperation in the Czech Republic, Estonia, Slovenia and Slovakia-Questionnaire' 7587/99, 26 April 1999.

⁵⁸ *Ibid.*

⁵⁹ L. Bot, Member in charge of the CEWP, Council of the European Union. Question (Personal email correspondence 16 June 2006).

⁶⁰ *Ibid.*

⁶¹ Council (n 49).

Table 5.3: The CEWP questionnaire on the underlying causes of and measures against corruption

	Police, border guard and customs “culture”
1.	Do independent, democratic elected staff associations/unions exist within Police, Border Guard and Customs?
2.	If such associations/unions do not exist, please describe the procedures and activities to establish good working conditions.
	Conditions of employment
1.	Are base salaries decent and/or attractive compared to other parts of the public sector, taking into account risks and responsibilities? Is the graduation of salaries an incentive for qualified staff to seek promotion? To what extent are salaries and working conditions at the heart of the problem of corruption (how open /prone do they make officials to corruption/bribes)?
2.	Are promotion based on impartial and fair selection criteria?
	Internal audit
1.	Has a system of regular and unannounced audits in police units and districts been created with the aim of controlling for instance the presence of collected fines/costs, seized drugs, stolen goods and other values?
2.	Which kind of control mechanism has been established to monitor/audit officials who have bureaucratic discretion to impose costs and fines?
3.	Do institutions responsible for receiving complaints and enforcing anti-corruption laws have sufficient resources in terms of staff, training and technical equipment?
4.	Which formal measures are established to prevent payoffs related to purchasing decisions made by officials with discretionary powers to engage in contracts on equipment and information technology deliveries?
	Transparency
1.	Can outsiders, such as ordinary citizens, non-governmental organisations or the media, obtain information (for example by referring to provisions in Freedom of Information Act) about how Police, Border Guard, Customs and Justice are operating (administratively and in general terms e.g. access to courts, legal aid, various procedures, costs involved)?
2.	Are statistics of disciplinary cases drawn up frequently and are annual reports established for internal use? Is this information also publicly available?
3.	Are investigations and filed reports on alleged improper behaviour by officials usually made public? Are prosecutions and court decisions in criminal cases made public?

Source: Council of the European Union, ‘Thematic paper on corruption’ 11412/00, 15 September 2000, see: Annex 2.

The goal of the second questionnaire was to assess the impact and dimension of corruption in the candidate countries. To this end, the CEWP made a distinction between ‘petty corruption, i.e. bribery’ and ‘higher, more sophisticated and serious forms of corruption’.⁶² Petty corruption was said to be ‘a more or less recurrent phenomenon, endemic to how police, border guard, customs and in some cases the judiciary carry out

⁶² Ibid, see: Annex 1.

routine activities related to the general public, such as traffic control, obtaining a passport, driver's license or visa, border crossing and customs clearance, treatment of prisoners and registry of companies'.⁶³ High level corruption was defined as involving officials' complicity with criminals or facilitating their illegal activities, which may influence the functioning of the judiciary, access to justice and legal aid, and may lead to the disclosure of operational information and intelligence to un-authorised persons or criminals.⁶⁴ The CEWP recognised that both of these forms of corruption seriously threaten the implementation of the *acquis*. More specifically, the addressees of the questionnaire were asked to answer ten questions about the state of corruption in the candidate countries as in Table 5.4.

Table 5.4: The CEWP questionnaire on the impact and dimension of corruption

1.	Please give your general impression of the integrity of police, border guard and customs officials and members of the judiciary.
2.	In your opinion, what forms of corruption are most common in the country?
3.	What is the public opinion towards police, border guard, customs and judiciary? Are there improvements?
4.	Are Police, Prosecution and Justice considered to work independently from each other?
5.	Are there known instances where major law enforcement operations or prosecutions (as well as technical secrets) have been compromised because of release of operational information and/or intelligence?
6.	Have networks between law enforcement officials and criminals been identified?
7.	Have law enforcement officials been identified as major criminals?
8.	Are some types of payments considered as acceptable tips or gifts to police and customs officials and members of the judiciary? If affirmative, are they legalised, publicly known and subject to reporting requirements?
9.	Are there any known instances of low-level officials passing a share of collected bribes on to higher-level officials?
10.	Are there any known instances of selection for "attractive" positions or for promotions because of an up-front payment?

Source: Council of the European Union, 'Thematic paper on corruption' 11412/00, 15 September 2000, see: Annex 1.

The work of the CEWP should be distinguished from other assessments carried out by the Commission in close cooperation with the candidate countries. The evaluation carried out by the CEWP was a collective process, which depended on Member States'

⁶³ Ibid.

⁶⁴ Ibid.

willingness to cooperate fully by giving particular assistance in preparing all the relevant information based on their direct experience of working with the candidate countries.⁶⁵ Member States were delivering the information to the CEWP either from internal sources or through their embassies in the candidate countries. Meanwhile, the lack of involvement of the governments of the candidate countries contributed to a more reliable assessment of corruption. It also allowed for questions to be raised about very sensitive issues, such as 'police brutality'.⁶⁶ Evaluating the extent of corruption, especially among public officials in the candidate countries, was a politically sensitive question and the candidate countries' governments had an interest in hiding or dismissing any corrupt practices.

It was also important that Member States could be directly involved in this evaluation. As a result, they had a direct opportunity to assess the preparedness of the candidate countries. In this way, they also became fully aware of the major weaknesses and capabilities of the candidate countries.

The results of the CEWP evaluations were reported to the Council and to all bodies within the Commission involved in the enlargement process, including the Directorate General Enlargement responsible for preparations of the Regular Reports. The Commission also took them into account when proposing the adjustment of the priorities and objectives of the Accession Partnerships and in the selection of financial assistance programmes. The findings of the CEWP also contributed to the texts of the EU common negotiating position in the area of JHA.⁶⁷

In November 2003, just a few months before the accession of the CEE countries to the EU, the CEWP submitted its final overall assessment on the state of play in the

⁶⁵ Council of the European Union, 'Report to the Council on the operation and scope of the evaluation mechanism pursuant to Article 5 of the Joint Action of 29 June 1998' 7695/3/99, 18 May 1999.

⁶⁶ Council (n 56).

⁶⁷ For example: Council of the European Union, 'Draft common position on Slovakia' 9372/02, 29 May 2002; 'Revised DCP Estonia' 13080/01, 22 October 2001.

field of JHA, where it argued that ‘corruption is still widespread in acceding countries and remains a significant concern’.⁶⁸ In particular, the CEWP pointed out that further efforts were needed in order to:

- further improve overall anti-corruption strategies
- implement decisive anti-corruption measures
- develop appropriate training for law enforcement officers and prosecutors
- develop a more co-ordinated multi-agency approach and improve investigative tools
- strengthen co-ordination and co-operation between law enforcement agencies and prosecution
- increase specialised staff to fight against corruption
- implement awareness-raising campaigns to increase public intolerance to corruption
- increase integrity, accountability and transparency in public administration⁶⁹.

In the opinion of the Council, the CEWP evaluations proved to be very valuable for the EU because they provided timely, balanced and thorough information, as well as a clear and in-depth picture of issues requiring action.⁷⁰

Conclusion: Assessment

Combating corruption was one of the greatest challenges that the candidate countries had to meet. The analysis in this chapter shows that the EU attached great importance to corruption throughout the pre-accession process and saw corruption as one of ‘the most

⁶⁸ Council of the European Union, ‘Enlargement: statement by the Collective Evaluation Working Party’ 14264/1/03, 17 November 2003.

⁶⁹ Ibid.

⁷⁰ Council of the European Union, ‘Towards a new program for Schengen evaluation and collective evaluations in the period 2004-2007’ 7162/04, 16 March 2004.

serious outstanding issues.⁷¹ Contrary to its competence in relation to Member States, the EU also established appropriate mechanisms with the task of measuring the extent of corruption within the candidate countries and monitoring the implementation of the EU anti-corruption *acquis*. It is also evident that the main institution dealing with corruption in a more systematic and comprehensive way was the CEWP, a group of experts within the Council. A complete assessment of its activities is impaired by the fact that the CEWP reports on each of the candidate countries remain confidential.

The only assessments of corruption within the candidate countries that are open to the public are contained in the Regular Reports. From the beginning to the end of the accession process, the Regular Reports described corruption as a widespread and a serious problem across the CEE candidate countries. However, the Commission, neither examined the roots of corruption nor measured its extent in the region. The Regular Reports contained only general statements about the prevalence of corruption within the CEE countries, and due to the political sensitivity of the Regular Reports, the Commission assessed corruption with the use of formulaic and carefully balanced language. Moreover, judging from the information sources used for the preparation of the Regular Reports, it is apparent that the Commission's evaluations were impressionistic and not conducted in a systematic way.

As will be discussed in Chapter Six, instead of focusing on the incidence of corruption, the Commission analysed anti-corruption legislation across the candidate countries.⁷² This approach appears to have been used broadly in the assessments of the progress made by the CEE countries. As Monar observed, while the mechanism of the CEWP allowed the Council to identify problems in the area of implementation and organisational structures, the Regular Reports focused slightly more on the reduction of diversity in the legislative area.⁷³

⁷¹ Council of the European Union, 'Input Commission monitoring tables (LT, LV, SK, PL)' 10359/2/02 15 January 2003.

⁷² This is in line with argument presented by the OSI Report (n 3), at

⁷³ J. Monar, (n 25), at 25

Progress in meeting the political membership criteria, including the existence of stable institutions to guarantee democracy, the rule of law or the fight against corruption, was particularly difficult to measure. All these goals were defined in a very vague manner, and it was hard to evaluate whether they had been achieved. This is contrary to other areas of *acquis* where evaluation was more straightforward, and where *acquis* was relatively well defined and technical and only very specific laws and decrees needed to be implemented.⁷⁴

From the available documents, it is evident that the CEWP made an attempt to evaluate the extent of corruption within the candidate countries. It was not, however, a comprehensive evaluation of the causes of corruption specific to every candidate country. This task of the CEWP was limited to the specific sectors of police, border guard, customs and judiciary. The focus was on the areas that were directly relevant to the correct application of the JHA *acquis* by the candidate countries. The CEWP did not conduct a comprehensive assessment, which would examine the levels of corruption in other services, such as the education system, medical services, the registry and permit services or tax revenue system. Meanwhile, only a comprehensive examination would allow the construction of an appropriate anti-corruption strategy for each of these countries.

The evaluation mechanisms developed by the CEWP had four main shortcomings. First, it started too late. The CEWP began a more focused evaluation of corruption in 2000, but the accession process was already moving ahead. In October 2002, the Commission recommended to admit the eight CEE countries to the EU. The negotiations were concluded at the Copenhagen European Council in December 2002 and subsequently the Treaties of Accession were signed in 2003. That gave the CEWP little time to conduct comprehensive evaluations. It is also important to emphasise that

⁷⁴ Tulmets (n 33), at 669.

preparations for enlargement covered a great number of policy areas, and anti-corruption policy was only one of many important issues.

Second, the CEWP evaluations should have been conducted in a transparent way, because public support for reducing corruption is the best lever for achieving high standards.⁷⁵ Public exposure of a government's faults in combating corruption mobilises the civil society and media, which can play the role of watchdog and put pressure on the government to act. Unfortunately, the system developed by the CEWP did not ensure this kind of public support.

Third, the lack of involvement of the national governments ensured greater objectivity, but at the same time impaired the effectiveness of this evaluation exercise. The evaluation was conducted by Member States and was therefore limited only to their knowledge. This reflected the general asymmetry of power and the formal inequality in favour of the existing Member States during the 2004 enlargement process.⁷⁶ This approach to anti-corruption evaluation was inappropriate and resulted in the limited impact of the CEWP reports. The experience of other international monitoring mechanisms shows that the major benefit of a mutual evaluation mechanism is that it can stimulate the governments' action and provide a platform for mutual learning and the exchange of best practices. Meanwhile, the CEWP reports did not provide any recommendations to the candidate countries.

Fourth, and finally, the available documents on the work of the CEWP suggest that its findings in the area of anti-corruption were based predominantly on the results of questionnaires and other reports. However, research on international evaluation methods reveals that country visits provide the most effective method for obtaining information

⁷⁵ F. Heimann and G. Dell, 'Report on Follow-up Process for UN Convention Against Corruption' (Transparency International 2006), at 3
<http://www.transparency.org/global_priorities/international_conventions/projects_conventions/uncac/uncac_monitoring_report> accessed 8 December 2007.

⁷⁶ N. Walker, 'Constitutionalising Enlargement, Enlarging Constitutionalism' (2003) *European Law Journal*, Vol. 9, No. 3, 365-385, at 365-368.

from multiple sources and for in-depth questioning by reviewers.⁷⁷ As discussed in Chapter One, country visits are the main component of the OECD WG, GRECO, FATF and MONEYVAL monitoring mechanisms.

What then was the primary goal of the CEWP evaluations? It seems that the purpose was to identify specific weaknesses in the area of JHA and then guide the candidate countries on how to address these shortcomings. Chapter Six builds on this discussion and argues that this goal was not achieved in the area of anti-corruption. It will be observed that the Regular Reports did not contain coherent recommendations for the candidate countries, but only, as Monar has put it, gave them ‘encouraging political signals to step up preparations in certain broad areas.’⁷⁸

⁷⁷ Heimann and Dell (n 75), at 9.

⁷⁸ J. Monar (n 25), at 25.

The EU anti-corruption strategy towards the Central and Eastern European candidate countries: achievement or missed opportunity?

As discussed in Chapter Three, the EU has not developed a coherent policy to assist Member States in the fight against domestic corruption. However, the enlargement process and the 'Copenhagen mandate' allowed the EU to impose much broader anti-corruption demands on the candidate countries. The high levels of corruption within the CEE countries and the dangers that corruption carried for the success of democratic transformation forced the EU to develop a new strategy against it. Moreover, the fight against corruption was crucial for the success of many reforms required by the EU membership. The outcome of public administration and judiciary reforms depended on how well the candidate countries addressed the problem of corruption.

It is also important to emphasise that during the pre-accession process, the Council explicitly recognised that corruption impaired the implementation of the *acquis* in many areas and thus combating corruption was 'an important part of the *acquis* in

itself'.¹ Moreover, the Council noted that corruption has a particularly harmful effect on the rule of law in the candidate countries, citing five reasons:

- generates a parallel system that operates independently of established public order
- is a breeding ground for illegal activities
- restricts access to public services for those who cannot or will not be party to it
- introduces uncertainty into trade
- distorts economic system and deprives the state of revenue.²

In addition, there was a more immediate danger that corruption could undermine the proper administration of EU aid programmes. For example, the national officials administering the SAPARD agricultural aid programme in Poland had to step down after allegations that they were incompetent and nominated because they were members of political parties in the ruling coalition.³

For the purposes of enlargement, the EU developed a variety of instruments to assist the CEE countries with democratic and economic reforms. The simultaneous political, economic and social transition that the CEE countries were undergoing constituted an enormous challenge. The new institutions that were meant to support the democratic process and the rule of law were not established. At the same time, however, the transition period constituted a great opportunity to influence the pace and content of anti-corruption reforms within candidate countries. As discussed in Chapter Four, the pre-accession process gave the EU huge leverage over domestic policy-making in the CEE countries. The EU was able to influence the content of reforms in many areas of public policy relevant for preventing and combating corruption, including the reforms of

¹ Council of the European Union, 'Examination of corruption in the applicant countries: Thought on methods' 10727/00, 27 July 2000.

² Ibid.

³ 'Brussels concerned at claims of Polish cronyism' *Financial Times* (12 September 2002).

public administration, the civil service, the police and the judiciary, and to monitor the laws on freedom of the media and the development of civil society.

Before the pre-accession strategy was launched, the EU not only did not have any policy supporting the anti-corruption efforts of the CEE countries, but also indirectly contributed to the spread of corruption. Until the adoption of the OECD Recommendation disallowing the deductibility of bribes to foreign officials in 1996⁴, companies from some Member States were receiving tax allowances for bribing public officials of the CEE countries.⁵ As already discussed in Chapter Four, the EU started to set anti-corruption standards and was closely monitoring the progress made by the candidate countries in the fight against corruption only since 1997, when combating corruption became an explicit membership condition.

Over time, the EU recognised that corruption was one of the greatest challenges that candidate countries had to face and throughout the whole pre-accession process devoted considerable attention to the problem. The warnings about the perils of corruption in the candidate countries were heard from the highest political levels of the EU. In 2000 the Commissioner responsible for Enlargement, Günter Verheugen, described corruption as a 'cancer that spreads unless it is tackled energetically'.⁶ The President of the European Commission, Romano Prodi, in 2002 referred to corruption in the CEE countries as 'extremely serious problem'.⁷

For the EU, an international entity with primarily an economic nature, but without a comprehensive framework against corruption within its Member States, it was a challenging task. The EU had to define anti-corruption standards for the candidate

⁴ OECD, 'Recommendation of the Council on the tax deductibility of bribes to foreign public officials' (1996) <<http://www.oecd.org/dataoecd/4/18/38028044.pdf>> accessed 6 December 2007.

⁵ Interview with Grażyna Kopińska, Stefan Batory Foundation, Anti-Corruption Programme (16 May 2005 Warsaw).

⁶ 'EU to warn applicants about corruption' *BBC News* (8 November, 2000) <<http://news.bbc.co.uk/1/low/world/europe/1012312.stm>> accessed 6 December 2007.

⁷ R. Prodi, European Parliament, Speech/02/463 (Brussels, 9 October 2002) <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/463/0/AGED&format=HTML&aged=&language=null&guiLanguage=en>> accessed 6 December 2007.

countries from scratch, as it did not have any legislative or institutional templates in this area. This task was even harder because there was no universal anti-corruption model that could be simply transposed to the CEE countries. The EU thus had to decide which anti-corruption standards it should demand from the candidate countries. In the end, it partly developed these standards itself and partly borrowed them from other international bodies, in particular the Council of Europe.

Some areas of the *acquis*, which had to be adopted by the candidate countries, were so precise that the EU did not have to supplement them with any other standards. The single market *acquis* in areas such as state aid and food safety regulations is good example. However, in other areas, like combating corruption, judicial independence or minority protection, the *acquis* was very limited or non-existent and that left the EU room for further elaboration of what the standards were. The EU was enabled to do this by the vagueness of the membership conditions formulated by the Copenhagen European Council.

As a result, the area of anti-corruption was characterised by the existence of double standards. The Member States were never judged on the basis of the anti-corruption criteria set for the candidate countries. This approach weakened the authority behind the EU demands. As Apap and Carrera observed, attempts to impose higher standards in the future Member States than those practised by some old Member States constituted a major cause of tension.⁸ This problem, however, was not only limited to the area of anti-corruption but was also present in other policy areas, such as the area of minority rights. Similar to the fight against corruption, the protection of minorities was an important component of democratic governance, and on that basis the EU was able to

⁸ J. Apap, and S. Carrera, 'Progress and Obstacles in the Area of Justice & Home Affairs in an Enlarging Europe' (2003) CEPS Working Document No. 194, at 7.
<http://shop.ceps.eu/BookDetail.php?item_id=1043> accessed 6 December 2007

impose standards on the candidate countries without having an equivalent policy towards its own Member States.⁹

The EU strategy against corruption within the candidate countries was based on three main elements: the establishment of anti-corruption standards, the evaluation against those standards and the provision of financial and technical assistance. The main goal of this chapter is to analyse this strategy and answer whether the EU used the great potential it had to influence the anti-corruption policies of the candidate countries. To that end, the chapter begins with a discussion of the anti-corruption standards set by the EU, making a clear distinction between the requirements of the *acquis* and the informal standards developed by the Commission specifically for the CEE countries and communicated through various policy documents. Next, the chapter discusses the ways in which the EU encouraged a transfer of know-how and best practice from Member States to candidate countries. Finally, the chapter assesses the impact of the EU accession on the anti-corruption policies in the candidate countries and points at its limits. In particular, the chapter focuses on the example of Poland, the country that faced the most serious corruption problems among the eight post-communist countries.

1. The EU anti-corruption standards for the candidate countries

The anti-corruption standards set for the candidate countries can be divided into two categories. The first category comprises the formal *acquis*, including the EU anti-corruption instruments applicable to all Member States, as described in Chapter Three. The second category includes standards developed by the Commission and the Council under the political criteria in various enlargement policy documents, mainly the Regular Reports and the Accession Partnerships. These standards were addressed only to the candidate countries. There is one important difference between these two categories. Whereas the stress during the negotiations was on meeting the requirements of the

⁹ M.H. Ram, 'Democratization through European Integration: The Case of Minority Rights in the Czech Republic and Romania' (2003) *Studies in Comparative International Development* Vol. 38, No. 2, 28-56, at 47-48.

formal *acquis*, and the candidate countries had to fully comply with the *acquis* before the accession, the compliance with other anti-corruption standards depended to a large extent on existence of EU pressure and the political will of the candidate countries.

1.1. Formal requirements of the *acquis*

Before accession, the candidate countries had to align their national legislations with the anti-corruption *acquis*, which for the purposes of the enlargement was extended to cover several international conventions. Therefore, the formal anti-corruption *acquis* could be divided into two categories: internal and external. Whereas the internal *acquis* was comprised of existing EU instruments, external *acquis* included the anti-corruption instruments of other international agencies, in particular the Council of Europe, the OECD and the UN.

The internal *acquis* included not only the EU anti-corruption instruments adopted under the third pillar but also the measures adopted under the first pillar, which do not directly regulate corruption but nevertheless contribute to the prevention of corruption within the Member States. In particular this concerns legislation in the area of public procurement, money laundering, auditing and accounting standards. The candidate countries were required to conduct exactly the same legislative changes as the Member States, the extent of which was analysed in detail in Chapter Three.¹⁰ These changes mainly involved the introduction of new offences into their criminal laws. Just as in the case of the Member States, the laws of the majority of the candidate countries did not criminalise corruption of foreign officials or Communities' officials and presented a series of loopholes with regard to corruption in the private sector and the liability of legal persons for corruption.¹¹ As discussed in Chapter Three, the EU instruments

¹⁰ For a comparative analysis of the anti-corruption legislation in the candidate countries (except for Slovakia) and the Member States see: T. Vander Beken, B. De Ruyver and N. Siron (eds), *The organisation of the fight against corruption in the Member States and candidate countries of the EU* (Maklu Antwerpen/Apeldoorn 2001).

¹¹ Ch. van den Wyngaert, 'The Protection of the Financial Interests of the EU in the Candidate States. Perspectives on the Future of Judicial Integration in Europe-Final Report' in P. Cullen (ed) *Enlarging the*

contain a very wide definition of bribery, as they refer to ‘advantages of any kind whatsoever’¹², and as a result, in some cases the *acquis* broadened the definition of bribery in the national laws of the candidate countries in this respect.¹³

The application of double standards was visible already at the stage of formulating the content of the *acquis* by the Council. In particular, the *acquis* was extended to include several international anti-corruption instruments, which the candidate countries had to adopt despite the lack of ratifications by existing Member States. The EU used its leverage over the CEE countries and pressured them to adopt these legal instruments, while being unable to apply such leverage towards its own Member States. From a legal point of view, it is interesting to consider how the international conventions became part of the *acquis*. In 1998, when the Council was deciding on the scope of the *acquis* in the area of JHA, there were three categories of international conventions indicated by the Committee of Permanent Representatives (COREPER) of the Member States:

1. those ratified by all Member States and therefore constitute the *acquis*
2. those not ratified by all the Member States, but so important that they should be part of the *acquis*, as they express the values of the EU
3. those not falling within first or second category, but thought very important with a view to creating the area of freedom, security and justice.¹⁴

Fight against Fraud in the European Union: Penal and Administrative Sanctions, Settlement, Whistleblowing and Corpus Juris in the Candidate Countries (Academy of European Law Trier Vol. 36 Köln: Bundesanzeiger 2004), 299-394, at 309 and 317.

¹² Articles 2 and 3 of the Convention drawn up on the basis of Article K.3 (2) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (adopted 26 May 1997, entered into force 28 September 2005), OJ C 195, 25.06.1997.

¹³ For example: the Lithuanian and Bulgarian laws limited the object of the offence to property advantages, see: Wyngaert (n 11), at 309.

¹⁴ H. Nilsson, Head of Unit, Council of the European Union: General Secretariat, Directorate-General H II Lecture (Université Libre de Bruxelles, Brussels, 15 July 2005).

On the basis of the above criteria, the Council decided on the content of the JHA *acquis*. Subsequently, the Commission closely monitored the adoption of these instruments in the Regular Reports. Some conventions were obligatory for the candidate countries to accede. These included the Council of Europe Convention of 8 November 1990 on Money Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and the UNCATOC.¹⁵ Both of these conventions were signed by old Member States before 2003. Other conventions to which accession was 'desirable' included the Council of Europe Criminal and Civil Law Conventions on Corruption and the OECD Convention.¹⁶ In practice, however, the Commission closely monitored the ratifications of all these instruments in the Regular Reports. As far as the OECD Convention is concerned, the pressure from the Commission brought limited results as four of the post-2004 Member States still have not adopted it.¹⁷ A much speedier ratifications of the international instruments by the candidate countries were visible in case of the Council of Europe instruments. The ratifications, as of 30 November 2007 looked as follows:

¹⁵ Acquis JHA 2003 is available at:

<http://ec.europa.eu/justice_home/doc_centre/crime/acquis/doc_crime_acquis_en.htm> accessed 6 December 2007.

¹⁶ Ibid.

¹⁷ Latvia, Lithuania, Malta and Cyprus, see: Chart of Ratifications of the OECD Convention <<http://www.oecd.org/dataoecd/59/13/1898632.pdf>> accessed 7 December 2007.

Table 6.1: Ratification of the Council of Europe instruments by the Member States and the CEE countries

Member State:	Criminal Law Convention on Corruption ¹⁸	Civil Law Convention on Corruption ¹⁹
Austria		30/8/2006
Belgium	23/3/2004	12/3/2007
Czech Republic	8/9/2000	24/9/2003
Denmark	2/8/2000	
Estonia	6/12/2001	8/12/2000
Finland	3/10/2002	23/10/2001
France		
Germany		
Greece		21/2/2002
Hungary	22/11/2000	4/12/2003
Ireland	3/10/2003	
Italy		
Latvia	9/2/2001	12/4/2005
Lithuania	8/3/2002	17/1/2003
Luxembourg	13/7/2005	
Netherlands	11/4/2002	
Poland	11/12/2002	11/9/2002
Portugal	7/5/2002	
Slovakia	9/6/2000	21/5/2003
Slovenia	12/5/2000	17/3/2003
Spain		
Sweden	25/6/2004	25/6/2004
United Kingdom	9/12/2003	

Source: <http://www.coe.int/t/dg1/greco/documents/instruments_en.asp> accessed 6 December 2007

From the above, it is evident that the CEE countries (in bold) ratified the Council of Europe conventions despite the lack of such ratifications by old Member States. This not only illustrates the effectiveness of the pressure coming from the EU, but also the continuing inability of the EU to speed up ratifications by old Member States. Moreover, in its Regular Reports, the Commission acknowledged the accession of the

¹⁸ Council of Europe, Criminal Law Convention on Corruption, ETS No.: 173 (adopted 27 January 1999, entered into force 1 July 2002)
<<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=173&CM=1&DF=7/11/2007&CL=ENG>> accessed 6 December 2007

¹⁹ Council of Europe, Civil Law Convention on Corruption, ETS No.: 174 (adopted 4 November 1999, entered into force 1 November 2003)
<<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=174&CM=1&DF=7/11/2007&CL=ENG>> accessed 6 December 2007

candidate countries to GRECO²⁰, commented on its evaluation missions and encouraged the candidate countries to follow the resulting recommendations.²¹ This shows that the EU relies on the anti-corruption mechanisms of the Council of Europe.

1.2. Anti-corruption standards beyond the *acquis*

The formal anti-corruption *acquis* focused on the criminalisation of bribery and did not allow for the exertion of much influence on the candidate countries' general strategies against corruption. Compliance with the *acquis* meant that the candidate countries had achieved the same anti-corruption standards as required under EU law for old Member States and had ratified major international instruments in this area. The EU, however, was aware that this was not enough to address the problem of corruption within the CEE countries and decided to reinforce its strategy.

Setting broader anti-corruption standards for countries was unprecedented at the EU level. As concluded by Chapter Four, the fact that the accession was the main goal of foreign policy for the CEE countries gave the EU great potential to influence their anti-corruption policies. There was a major difference in the way the EU addressed the problem of corruption within Member States and candidate countries. In its policy towards Member States, EU action depends on the limited competence in this area and, most of all, the political will of the Member States. The distinction between EU and national competences in the area of anti-corruption was not upheld in the policy towards the CEE countries. As Grabbe has argued, the membership conditions covered several areas where Member States have long been very resistant to extending EU competence.²² The 'Copenhagen mandate' gave the EU an unlimited option to demand

²⁰ The CEE countries acceded to GRECO in the following years: in 1999 Estonia, Hungary, Lithuania, Poland, Slovakia and Slovenia, in 2000 Latvia and in 2002 the Czech Republic.

²¹ For example: Commission (EC) 'Comprehensive monitoring report on Poland's preparations for membership' (2003), at 17
<http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/cmr_pl_final_en.pdf> last accessed 6 December 2007.

²² H. Grabbe, 'Europeanization Goes East: Power and Uncertainty in the EU Accession Process' in K. Featherstone and C.M. Radaelli (eds), *The Politics of Europeanization* (OUP 2003), 303-327, at 308.

reforms in areas such as anti-corruption policy, as well as judicial and civil service reform. It also gave the EU great flexibility in defining the policy goals for the CEE countries in accordance with the EU's perceived needs and allowed the EU to adjust demands for reform on an *ad hoc* basis.

Before discussing the particular standards developed by the Commission in this area, it is worth emphasising that, as argued in Chapter Five, the EU did not evaluate the extent or causes of corruption in a comprehensive way. These findings are in line with Reed, who criticised the Commission for the lack of a clear approach to corruption in candidate countries and for not formulating a set of assumptions about the roots of corruption or the policies needed to deal with it.²³ The fact that the EU did not decide to conduct a more comprehensive study suggested that it did not decide to devise anti-corruption strategies tailored to the needs of individual candidate countries and instead opted for a 'one-size-fits-all' approach in defining anti-corruption standards.

Over time, corruption became one of the most serious problems and a potential obstacle to enlargement, but as observed by Chapter Four, until the start of the accession negotiation in 1998 and 1999, the issue of corruption was neglected. The Europe Agreements regulated corruption in a very limited way. All of them, with the exception of the agreement with Poland²⁴, contained provisions on cooperation with the aim of developing audit and financial control standards in national administrations.²⁵ The goal of such cooperation was to ensure the proper management of the pre-accession financial assistance, which contributed to enhancing standards and preventing corruption in the public administrations of the candidate countries.

²³ Q. Reed, 'Corruption and the EU accession process: who is better prepared?', in Transparency International, *Global Corruption Report 2004*, at 122
<http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2004#download> last accessed 6 December 2007.

²⁴ Europe Agreement with Poland, OJ L 348, 31.12.1993.

²⁵ For example: Article 85 of the Europe Agreement with Hungary, OJ L 347, 31.12.1993.

The Europe Agreements signed with Poland, Hungary²⁶, Slovakia²⁷ and the Czech Republic²⁸ did not refer to corruption in an explicit way. The agreements signed with Estonia, Latvia, Lithuania and Slovenia came after 1997, when combating corruption was recognised as an explicit membership condition, and did mention this issue.²⁹ They contained a special clause on cooperation in the prevention of corruption. The Member States agreed to cooperate with the candidate countries and provide technical and administrative assistance in the prevention of corruption. The cooperation included the drafting of national legislation, the establishment of information centres and databases, measures to enhance the efficiency of the institutions charged to prevent corruption, staff training, the development of investigative facilities and the formulation of mutually acceptable measures to prevent corruption.³⁰ Moreover, all the Europe Agreements provided for administrative and technical assistance with the aim of helping the candidate countries to establish standards in the area of money laundering equivalent to those adopted by the Community and international agencies, in particular the FATF.³¹

It was later in the pre-accession process that the Commission started to guide the candidate countries in their efforts to fight corruption. The first anti-corruption obligations resulted from the signing of the Pre-Accession Pact on Organised Crime (the Pre-Accession Pact)³² in 1998 by the EU and the CEE countries. The primary goal of the Pact was to help the candidate countries to implement the EU *acquis* in the area of JHA before entering the EU. It also contained a list of international instruments that would serve as a basis for intensified cooperation.³³ The preamble to the Pre-Accession Pact emphasized the commitment of the signatory countries to democracy, human rights and

²⁶ Europe Agreement with Hungary, OJ L 347, 31.12.1993.

²⁷ Europe Agreement with Slovakia, OJ L 359, 31.12.1994.

²⁸ Europe Agreement with the Czech Republic, OJ L 360, 31.12.1994.

²⁹ Europe Agreement with Estonia, OJ L 068, 09.03.1998; Europe Agreement with Latvia OJ L 026, 02.02.1998; Europe Agreement with Lithuania OJ L 051, 20.02.1998; Europe Agreement with Slovenia, OJ L 051, 26.02.1999.

³⁰ For example: Article 100 of the Europe Agreements with Estonia (n 29).

³¹ For example: Article 89 of the Europe Agreements with Estonia (n 29).

³² Pre-Accession Pact on Organised Crime Between the Member States of the European Union and the applicant countries of Central and Eastern Europe and Cyprus (the Pre-Accession Pact) OJ C 220, 15.07.1998.

³³ Principle 2 of the Pre-Accession Pact.

the rule of law and expressed their determination to work together closely to combat organised crime and other forms of serious crime. Most importantly, in the preamble all the countries acknowledged that 'satisfactory legal bases for combating corruption and a consistent application thereof' are necessary for effective law enforcement cooperation and judicial cooperation at both national and international level.

The signatories agreed on fifteen principles, which encompassed the essential elements of cooperation between the EU and the candidate countries in the area of organised crime. The countries recognised that 'corruption is one of the major threats to our societies, defrauding citizens and private and public institutions alike.'³⁴ They underlined the need to develop a comprehensive policy against corruption in all its forms following consultations with the Council and the Commission, as well as the need to associate the CEE countries with this endeavour. Assisting the candidate countries in preventing and combating corruption was one of the main goals of the Pre-Accession Pact.³⁵ This Pact obliged the signatories to develop their own national programmes for the fight against corruption. In response to this duty, the government of the Czech Republic, for example, developed its first national anti-corruption strategy.³⁶

The responsibility for the implementation of the Pact was entrusted to a pre-accession pact expert group (PAPEG) comprised of experts from the participant states.³⁷ Its main tasks were to identify and counteract threats connected with international organised crime, monitor and evaluate action to counteract such crime in each of the participant countries and plan specific projects in to combat organised crime in order to prepare the applicant countries for accession.³⁸ In the area of anti-corruption, the work of PAPEG was complementary to the work done by the CEWP, as discussed in Chapter

³⁴ Principle 12 of the Pre-Accession Pact.

³⁵ Council of the European Union, 'Swedish intentions regarding the pre-accession pact on organised crime' 5175/01, 10 January 2001, at 3.

³⁶ J. Fenyk and S. Klouckova, 'Topical tasks in combating corruption in the Czech Republic' (2001) AGON No. 31, 5-7, at 5-6 <http://ec.europa.eu/anti_fraud/publications/agon/agon_31.pdf> accessed 6 December 2007.

³⁷ Principle 15 of the Pre-Accession Pact.

³⁸ Ibid.

Five. It was agreed that PAPEG and the CEWP would report to one another on developments in the field of corruption.³⁹ In 2000 PAPEG was asked to concentrate on three of the principles in the Pre-Accession Pact: the establishment of central coordinating units for combating organised crime, combating corruption and the establishment of money-laundering and financial crime units in the candidate countries. As far as combating corruption was concerned, PAPEG was collecting information from the candidate countries on practical measures planned or being taken to tackle corruption.⁴⁰

The EU started to evaluate anti-corruption policies across the CEE countries in a more regular way after 1998 through the annual Regular Reports. From the analysis of all these documents, it is possible to list the legislative and institutional arrangements that the Commission considered important for a national policy against corruption. These included:

- the existence of political commitment to fight corruption
- the strengthening of the legal and institutional framework in the fight against corruption
- the adoption of an anti-corruption strategy, involving the development of a clear and comprehensive government programme against corruption
- the strengthening of anti-corruption preventive measures in order to strike a good balance between preventive and repressive measures
- the existence of anti-corruption bodies in the public administration
- the development of mechanisms for closer co-operation and co-ordination among different institutions concerned with the fight against corruption
- the creation of codes of conduct/ethics for public officials and practitioners in the liberal professions

³⁹ Council (n 35).

⁴⁰ Council of the European Union, 13985/00, 18 December 2000, at 2.

- the provision of specialised education and training programmes for police officers, prosecutors and judges
- the provision of appropriate resources, equipment and trained personnel to combat corruption and money laundering
- the efficiency of the police and the judiciary in the fight against corruption
- the provision of sufficient manpower, equipment and pay for public officials
- the regulation of lobbying
- addressing political party financing
- the regulation of conflict of interest
- the financial screening of politicians
- providing for the independence of internal controllers within all state bodies
- launching a public awareness raising campaign as to the dangers of corruption
- establishing closer cooperation with the general public and NGOs

Taken together, the above anti-corruption indicators constitute a good basis for a comprehensive national anti-corruption strategy. It is evident that the Commission moved beyond simply the criminalisation of corruption and focused also on prevention policies within the candidate countries. However, it is important to emphasize that none of the candidate countries was regularly assessed on the basis of all of these criteria nor asked to fully comply with them.

The strategy of the EU suffered from two major weaknesses. First, the Commission merely acknowledged the progress made by the candidate countries across the indicators above without any further elaboration of what precisely good standards were. For example, although the EU did pressure all the governments to adopt national anti-corruption strategies, it did not advise them on the specific content of these strategies. The Commission's assessments focused on the anti-corruption legislation and institutional arrangements in the CEE countries. They often merely acknowledged in which of the listed domains new regulations had been adopted. The Regular Reports

contained rather *ad hoc* evaluations of the anti-corruption policies of these countries without a clear strategy behind these evaluations. As OSI report argued, there was ‘...no indication of either the benchmarks employed to assess corruption levels or the level of progress that would be considered sufficient by the Commission, either in terms of formal anti-corruption policy or in terms of reducing levels of corruption.’⁴¹

A second weakness of the EU strategy was that the standards were not presented in any systematic way or clearly communicated in a single document to the candidate countries. Instead, they were communicated through various pre-accession instruments. Moreover, the above anti-corruption criteria were not applied in any consistent way across the candidate countries. Different criteria were applied to different countries. For example, the importance of the involvement of civil society in the anti-corruption campaigns was emphasized only in the 2001 Regular Report on Lithuania⁴², the 2002 Regular Report on Latvia⁴³, the 2002 Regular Report on Lithuania⁴⁴ and the 2003 Regular Report on Lithuania.⁴⁵ Spotlighting the issue only in these two countries was not justified, as in all candidate countries efforts to bring civil society into the anti-corruption project was of utmost importance.⁴⁶ One of the legacies of the communist system was the lack of developed civil society organizations, which play an important role in raising the public awareness of the dangers of corruption and, along with the media, can publicise corrupt practices within local and central government. Another example of inconsistency is the fact that the need to regulate lobbying was mentioned

⁴¹ Open Society Institute, ‘Monitoring the EU Accession Process: Corruption and Anti-Corruption Policy’, 2002, at 22 (OSI Report) <<http://www.eumap.org/reports/2002/corruption>> accessed 6 December 2007.

⁴² Commission (EC), ‘2001 Regular Report on Lithuania’s Progress Towards Accession’ SEC(2001) 1750, 13.11.2001, at 21.

⁴³ Commission (EC), ‘2002 Regular Report on Latvia’s Progress Towards Accession’ SEC(2002) 1405, 9.10.2002, at 24.

⁴⁴ Commission (EC), ‘2002 Regular Report on Lithuania’s Progress Towards Accession’ SEC(2002) 1406, 9.10.2002, at 26.

⁴⁵ Commission (EC), ‘Comprehensive monitoring report on Lithuania’s preparations for membership’ (2003), at 14. <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/cmr_lt_final_en.pdf> accessed 6 December 2007.

⁴⁶ OSI Report (n 41), at 29.

only in the assessments of Latvia⁴⁷, Slovakia⁴⁸, Lithuania⁴⁹ and Hungary.⁵⁰ The OSI report criticised this approach and argued that uncontrolled lobbying was a major source of corruption in all CEE countries.⁵¹ Similar inconsistency was also visible in the areas of the financing of political parties and the regulation of conflict of interests.⁵²

It is, therefore, not the scope of the EU policy recommendations that deserves criticism. The Regular Reports provided for a reasonably comprehensive set of anti-corruption standards. It is rather the inconsistency in applying and evaluating the compliance with these standards that impaired the success of EU policy. The candidate countries should have been presented with a comprehensive set of criteria at the beginning of the accession process and then systematically assessed on their progress against those criteria. The EU strategy would bring better results if the candidate countries knew what exactly was expected of them in this area.

In May 2003, only a year before the accession took place, the Commission presented the candidate countries with the most comprehensive set of anti-corruption criteria, entitled the 'Ten Principles for Improving the Fight against Corruption in Acceding, Candidate and other Third Countries.'⁵³ These principles not only recommended full compliance with the EU *acquis* and international conventions in this area, but also pointed to the need to include preventive measures in the national anti-

⁴⁷ Commission (EC), 'Comprehensive monitoring report on Latvia's preparations for membership' (2003), at 15. <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/cmr_lv_final_en.pdf> accessed 6 December 2007.

⁴⁸ Commission (EC), 'Comprehensive monitoring report on Slovakia's preparations for membership' (2003), at 13 and 52. <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/cmr_sk_final_en.pdf> accessed 6 December 2007.

⁴⁹ Commission (EC), '2000 Regular Report on Lithuania's Progress Towards Accession', at 18 and 83 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/lt_en.pdf> accessed 6 December 2007.

⁵⁰ Commission of the European Communities, '2001 Regular Report on Hungary's Progress Towards Accession', at 18 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/hu_en.pdf accessed 6 December 2007.

⁵¹ OSI Report (n 41), at 56.

⁵² Ibid.

⁵³ Commission (EC), 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy Against Corruption', COM(2003) 317 final, 28.5.2003, see: Annex.

corruption strategies, such as codes of conduct in the public and private sectors, merit-based recruitment and promotion policies in the public administration, disclosure of assets by private servants, rules on whistleblowing and transparent rules on party financing (See: Appendix 2).

The Ten Principles developed by the Commission overlap to a large extent with the Council of Europe's Twenty Guiding Principles (See: Appendix 1). At first sight, the Council of Europe's principles appear much broader. However, some areas covered by the Twenty Guiding Principles are already covered by provisions of the EU *acquis*, thus the Commission did not have to repeat them separately. This applies, in particular, to the criminalisation of national and international corruption, the seizure and deprivation of the proceeds of corruption offences, the liability of legal persons and transparent public procurement procedures.

The practical effect of the EU's Ten Principles was very limited. Rather than having any bite, countries were only invited to take the principles into account when devising their national strategies against corruption. Unlike in the case of the Council of Europe's GRECO, there was no follow-up mechanism to assess whether the principles were successfully implemented at the national level.

The EU also used the 'Copenhagen mandate' to insist on reforms in three areas of public policy that are highly relevant for the fight against corruption: public administration, the judiciary and financial control. As discussed in Chapter Four, the 2004 enlargement was the first in which candidate countries were asked to demonstrate that their national public administrations and judiciary had the capacity to take on the obligations of membership and properly implement the *acquis*.

After 1989, all the post-communist countries had to develop an effective and independent judiciary and civil service, both of which used to be subordinated to the communist party. The Commission consistently urged each candidate country to reform

its public administration and create an independent and professional civil service.⁵⁴ There was no formal *acquis* setting standards for public administrations. Over time, however, a general agreement on key components of good governance emerged among the Member States, including not only the rule of law and principles of reliability, predictability, accountability and transparency, but also technical and managerial competence, organisational capacity and citizens' participation.⁵⁵ Candidate countries were asked to take these principles into account and adhere to standards promoted by the Member States in reforming their public administrations.

Judicial independence was also a membership condition in its own right and throughout the pre-accession process, the Commission consistently pushed for reforms to establish and ensure judicial independence and the efficiency of the court system.⁵⁶ In particular, the EU insisted on the adoption of measures that prevent and reduce corruption in the judiciary, including procedures for the appointment, promotion, disciplinary procedures and remuneration of judges.⁵⁷ According to the World Bank's report in 2006, however, corruption within the judiciary still constituted a problem, as the reforms of the judiciary in the candidate countries tended to focus on ensuring its independence rather than its accountability or capacity, and establishing independence without ensuring accountability creates opportunities for corruption.⁵⁸

⁵⁴ For example: Commission (EC), '1999 Regular Report on Poland's Progress Towards Accession', at 59-60 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/poland_en.pdf> accessed 6 December 2007 and '1999 Regular Report on Slovakia's Progress Towards Accession', at 14 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/slovakia_en.pdf> accessed 6 December 2007.

⁵⁵ SIGMA, 'European Principles For Public Administration' (1999) SIGMA Papers No. 27, at 5 <<http://www.sigmaweb.org/>> accessed 6 December 2007.

⁵⁶ Open Society Institute, 'Judicial Independence in the EU Accession Process' (2001) <<http://www.eumap.org/reports/2001/judicial>> accessed 6 December 2007.

⁵⁷ For example: Commission (EC), '2002 Regular Report on Estonia's Progress Towards Accession' SEC(2002) 1402, 9.10.2002, at 23; '2002 Regular Report on Poland's Progress Towards Accession' SEC(2002) 1408, 9.10.2002, at 24-26; '2002 Regular Report on Hungary's Progress Towards Accession', at 15-16, available at: <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/hu_en.pdf> accessed 6 December 2007.

⁵⁸ The World Bank, J.H. Anderson and Ch.W. Gray, 'AntiCorruption in Transition 3. Who is Succeeding and Why?' (2006), at xvi <<http://siteresources.worldbank.org/INTECA/Resources/ACT3.pdf>> accessed 6 December 2007.

Another area relevant for the fight against corruption was financial control. The EU required candidate countries to set up an effective system for the protection of the financial interests of the Communities. The candidate countries had to comply with the requirements of Article 280(2) EC and protect the financial interests of the Communities as they would protect national financial interests. Considering that about 80% of the Community budget is administered by national authorities⁵⁹, it was a priority for the EU to ensure that the national financial control systems of the candidate countries met the standards of sound financial management. As no distinction was to be made in terms of control of the national budget and of EU resources, the Commission was assessing the candidate countries' public financial control systems in general. It was concerned, in particular, with the existence of effective and transparent financial management, a clear demarcation between financial management and internal audit, and the independence of external audit.⁶⁰ As Maniokas observed, in the negotiations in the area of financial control, '...the Commission went as far as to prescribe the rules of functioning of the whole national system of internal and external audit and financial control, which was and remains a national competence'.⁶¹

In this context it is important to note the role of OLAF in contributing to the creation of independent anti-fraud structures in the candidate countries. The most important example in this area is a PHARE project called 'OLAF Poland' established in 2001 with the aim of establishing a special anti-fraud unit within the Polish administration to increase its capacity to combat fraud affecting the Community budget in relation to pre-accession funds.⁶² In addition, all the candidate countries were required

⁵⁹ Commission (EC), 'Report from the Commission to the European Parliament and the Council. Protection of the financial interests of the Communities – Fight Against Fraud – Annual report 2006' COM(2007)390, 6.7.2007, at 5.

⁶⁰ For example: Commission (EC), '2000 Regular Report on Poland's Progress Towards Accession, at 82-83 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/pl_en.pdf> accessed 6 December 2007.

⁶¹ K. Maniokas, 'The method of the European Union's enlargement to the east: a critical appraisal' in A.L. Dimitrova (ed), *Driven to Change: The European Union's Enlargement Viewed from From The East*, (Manchester University Press 2004), 17-37, at 22.

⁶² Commission (EC), 'Report from the Commission. Protection of the Financial Interests of the Communities and Fight Against Fraud-Annual Report 2001' COM(2002) 348 final/3, 6.8.2002, at 16.

to set up anti-fraud services (AFCOS) to coordinate the legislative, administrative and operational activities linked with the protection of the Communities' financial interests.⁶³ Although the above reforms in the area of financial control were initiated with the primary aim of protecting the Community budget, they allowed national authorities to learn from Western models in this area and later transfer standards to the national level.

2. Technical and financial assistance as a policy transfer instrument

2.1. The EU programmes

This section discusses the extension of *acquis* to the candidate countries within the EU pre-accession process as a type of policy transfer, defined as a process by which knowledge about policies, administrative arrangements, institutions and ideas in one political system is used in the development of policies, administrative arrangements, institutions and ideas in other political systems.⁶⁴ In the area of anti-corruption, the EU was supporting policy transfer among individual Member States and candidate countries also within the framework of EU technical and financial assistance for the CEE countries. As a result, the limited anti-corruption *acquis* was to a large extent accomplished by a transfer of best practices and know-how from individual Member States. This took place mainly through twinning projects financed under the PHARE programme. As already discussed in Chapter Four, the PHARE programme was the main financial instrument used in the accession of the CEE countries. Since, 1996 financial assistance under PHARE supported developments in the area of JHA. However, as Monar observed, the EU 'did little to bring the accession preparations in

⁶³ Commission (EC), 'Commission Report. Protection of the Financial Interests of the Communities and Fight Against Fraud-Annual Report 2002' COM(2003) 445 final/2, 4.12.2003, at 11-13.

⁶⁴ D.P. Dolowitz and D. Marsh, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making' (2000) *Governance*, Vol. 13, No 1, 5-24, at 5.

the area of JHA to an earlier and more effective start.’⁶⁵ The principal PHARE instruments in the field of JHA were horizontal programmes established only in 1996 and 1999 to assist the CEE countries in transposing of the *acquis* in this area.⁶⁶

It is important to point out that PHARE-funded reform projects were not dictated by the EU. Instead, the Commission responded to proposals from recipient countries in its selection of which sector to assist.⁶⁷ Most importantly, the EU could not do much when the government concerned was reluctant to accept programmes that supported the rule of law or the fight against corruption in particular.⁶⁸ The EU could not support such initiatives against the will of candidate countries’ governments.

The anti-corruption reforms of the candidate countries were reinforced mainly through the twinning projects, which were EU policy instruments developed for the needs of the 2004 enlargement. Under twinning, an expert from a Member State was seconded to a candidate country to assist in the development of the modern and efficient administration needed to implement the *acquis*.⁶⁹ Each candidate country was free to select the twinning partner that best suited its own culture, organization and national interest. Twinning provided an excellent platform for sharing and learning best practices. It allowed Member States to export legislative and institutional models to the candidate countries, which had the chance to use the standards that worked well in Member States and use them as a template for anti-corruption reforms.

⁶⁵ J. Monar, ‘EU Justice and Home Affairs in the Eastward Enlargement: The Challenge of Diversity and EU Instruments and Strategies’ (2001) ZEI Discussion Paper C 91, at 6.

<http://www.zei.de/download/zei_dp/dp_c91_monar.pdf> accessed 6 December 2007

⁶⁶ Commission (EC), ‘Decision of 1999 Establishing a Phare horizontal programme on Justice and Home Affairs’ <http://ec.europa.eu/enlargement/fiche_projet/document/ZZ9910%20-%201999%20%20Justice%20and%20Home%20Affairs.pdf> accessed 6 December 2007.

⁶⁷ European Parliament, ‘The PHARE programme and the enlargement of the European Union’ (1998) Briefing No 33, PE 167.944, 4.12.1998, at 12.

⁶⁸ Interview with Mienke de Ruiter, General Secretariat DG H 2 B - Judicial Cooperation, Council of the European Union (5 December 2005 Brussels).

⁶⁹ Commission (EC), ‘Twinning: Building Europe Together’ (2006), at 8

<http://ec.europa.eu/enlargement/pdf/twinning_brochure_2005_en.pdf> accessed 6 December 2007.

In 2002, the OSI report concluded that PHARE projects related to anti-corruption policy were created on an *ad hoc* basis with no centralised pool of resources or official EU expertise, or any system of twinning or secondment organised on a systematic and planned basis.⁷⁰ Indeed, before 2003 only two twinning projects designed specifically to support anti-corruption efforts were launched, including in 2000 in Slovakia⁷¹ and in 2001 by the Czech Republic.⁷² However, in 2003 all the remaining countries, except for Slovenia, participated in such projects.⁷³ As Chapter Five observed, the levels of corruption in Slovenia were not perceived as a serious problem by the EU at any point during the accession process.⁷⁴

Twinning gave the EU the ability to influence the fulfilment by candidate countries of the accession criteria, especially in the field of institutional capacities, where the *acquis* was non-existent.⁷⁵ According to Tulmets, it produced elements of soft law in sectors that had little Community involvement.⁷⁶ The main advantage of twinning projects was that they were set to deliver specific and mandatory results agreed between the parties in advance. As discussed earlier, the lack of such an approach is the main criticism of the EU strategy against corruption in the CEE countries. Unlike the Regular Reports, every twinning project set out and aimed at the achievement of specific project benchmarks, which often went beyond the scope of the *acquis*. As a result, the twinning

⁷⁰ OSI Report (n 41), at 72.

⁷¹ Project Fiche, 'Support to the Implementation of the National Programme of Fight Against Corruption', SK0008.01 <http://ec.europa.eu/enlargement/fiche_projet/document/sk0008.01_anti-corruptionrev.pdf> accessed 6 December 2007.

⁷² Project Fiche, 'Improving the Fight against Corruption and Economic Crime', CZ01-07-06 <http://ec.europa.eu/enlargement/fiche_projet/document/cz01_0706_improving_the_fight_against_.pdf> accessed 6 December 2007.

⁷³ Estonia: 'Reducing corruption' 2003/005-850.01.01; Hungary: 'Support to the Police investigation capacity in the areas of organized crime, financial crime and corruption' 2003/004-347-03-03; Latvia: 'Development and Strengthening of the Corruption Prevention and Combating Bureau' 2003/004-979-01.03; Lithuania: 'Strengthening of Administrative Capacities in the Fight against Corruption', 2003.004-341.05.03; Poland: 'Strengthening of the Implementation of the Anti-corruption Strategy', 2003/005-710.01.03' <http://ec.europa.eu/enlargement/fiche_projet/index.cfm> ' accessed 6 December 2007.

⁷⁴ See: Table 5.2.

⁷⁵ E. Tulmets, 'The Management of New Forms of Governance by Former Accession Countries of the European Union: Institutional Twinning in Estonia and Hungary' (2005) *European Law Journal*, Vol.11, No. 5, pp. 657-674, at 673.

⁷⁶ *Ibid*, at 658.

projects partially offset the vagueness of the Regular Reports. Their success depended on the quality of the twinning adviser and the will of the candidate country to use the potential they offered. As Grabbe observed, the advice on how to reform institutions depended on the experience and assumptions of the individual pre-accession advisor, which were in turn influenced by his or her nationality and background.⁷⁷ The EU continued to provide twinning assistance to the CEE countries between the date of accession and the end of 2006 in the framework of the PHARE Transition Facility.⁷⁸ Twinning support in the area of anti-corruption was received in 2005 and 2006 by Poland⁷⁹, the Czech Republic⁸⁰ and Slovakia.⁸¹

During the pre-accession process, all the twinning programmes were providing assistance to the governments of the candidate countries. There was no separate EU assistance programme that aimed at providing financial and technical support to NGOs active in the area of anti-corruption. It was only after the accession of the CEE countries that the EU launched a programme of grants for NGOs from post-2004 Member States working in the area of anti-corruption.⁸² The lack of broader strategy and support for NGOs within the pre-accession process was also confirmed in the findings of the OSI report, which argued that the approach of the Commission in the area of anti-corruption policy was focused on ‘...elites, top-down anti-corruption strategies.’⁸³ As already

⁷⁷ Grabbe (n 22), at 315.

⁷⁸ Article 34(2) of the Act of Accession provided for a Transition Facility with the aim to provide continued support for the reinforcement of administrative and judicial capacity, including anti-corruption strategies, in the post-2004 Member States during the period of 2004-2006, OJ L 236, 23.09.2003 <http://ec.europa.eu/enlargement/financial_assistance/transition_facility_en.htm> accessed 6 December 2007.

⁷⁹ See 3.1. below.

⁸⁰ Project Fiche, ‘Reinforcement of the Czech Police Capacity in Combating Corruption and Economic Crime’, 2005/017/518.04.02 <http://ec.europa.eu/enlargement/fiche_projet/document/2005-017-518-04.02%20-%20Corruption.pdf> accessed 5 December 2007.

⁸¹ Project Fiche, ‘Continued Support to the Fight against Corruption’, 2005/017-464.03.03 <http://ec.europa.eu/enlargement/fiche_projet/document/2005-017-464.03.03%20-%20Fight%20against%20Corruption.pdf> accessed 5 December 2007.

⁸² For more information, see:

<http://ec.europa.eu/justice_home/funding/2004_2007/support_ngo/funding_support_en.htm> accessed 5 December 2007.

⁸³ OSI Report (n 41), at 32.

noted, the Commission evaluated and encouraged a greater role for civil society in anti-corruption efforts only in the Regular Report on Latvia and Lithuania.

In addition to PHARE, several specific programmes in the area of JHA supported initiatives of the CEE countries in their strategies against corruption and organised crime. It concerns, in particular, four programmes: FALCONE⁸⁴, GROTIUS⁸⁵, OISIN⁸⁶ and HIPPOKRATES⁸⁷, which were replaced in 2003 by a single framework programme called AGIS.⁸⁸ The goal of the AGIS programme, which ran from 2003 until 2006, was to help legal practitioners and law enforcement officials from the Member States and candidate countries to set up Europe-wide networks, as well as to exchange information and best practices. Similar to the four mentioned programmes it replaces, AGIS supported projects such as training, conferences, conducting research and dissemination of the results.⁸⁹ Examples of activities undertaken in the area of anti-corruption included:

- seminars and conferences for officers from law enforcement and other administrative areas within all Member States and candidate countries to analyse the situation of corruption within the EU and candidate countries,
- a conference on corruption in healthcare,
- a comparative study of the anti-corruption systems within the competencies of the Supreme Audit Institutions of Europe and
- a study on Corruption within the Public Sector.⁹⁰

⁸⁴ FALCONE is a programme for exchanges, training and cooperation for persons responsible for action to combat organised crime; Joint Action 98/245/JHA, OJ L 99, 31.3.1998.

⁸⁵ GROTIUS is a programme of incentives and exchanges for legal practitioners; Joint Action 96/636/JHA, OJ L 287, 8.11.1996.

⁸⁶ OISIN is a programme for the exchange and training of, and cooperation between, law enforcement authorities; Joint Action 97/12/JHA, OJ L7, 10.1.1997.

⁸⁷ HIPPOKRATES is a programme of incentives and exchanges, training and cooperation for the prevention of crime; Council Decision 2001/515/JHA, OJ L 186, 7.7.2001.

⁸⁸ Council Decision 2002/630/JHA of 22 July establishing a framework programme on police and judicial cooperation in criminal matters (the AGIS Decision), OJ L 203, 1.8. 2002.

⁸⁹ Article 4 of the AGIS Decision.

⁹⁰ AGIS Implementation Reports for Years 2003, 2004 and 2005 at:

http://ec.europa.eu/justice_home/funding/2004_2007/agis/funding_agis_en.htm# accessed 6 December 2007.

All of these programmes in the area of JHA offered many advantages to the beneficiary countries. Most importantly, they contributed to the exchange of know-how and experience in the area of preventing and combating corruption in Europe. The CEE countries usually had very limited funds for such activities within their national budgets. Programmes like AGIS provided an excellent opportunity for candidate countries' police officers, judges and prosecutors to participate in an evolving European network for judicial and police co-operation.

2.2. Joint programmes with the OECD and the Council of Europe

The EU cooperated closely with other international organisations in providing financial and technical assistance to the post-communist countries. In the area of anti-corruption, two joint programmes deserve a special mention. These were the Sigma programme in cooperation with the OECD and the Octopus programme in cooperation with the Council of Europe.

One of the priorities of the PHARE programme was to help the CEE countries to build sound, efficient and effective public institutions, which would enable them to satisfy the "Copenhagen criteria". This was also the main goal of the Sigma programme (Support for Improvement in Governance and Management), which was launched in 1992 as a common initiative of the OECD and the EU and principally financed by PHARE.⁹¹ The annual Sigma assessments of the progress made by the CEE countries have served as an input to the Commission's Regular Reports since 1999. Sigma's assessments covered six sectors: civil service and administrative legal framework, policy capacities, public expenditure management, public procurement, public internal financial control, and external audit.⁹² The major advantage of the Sigma programme was that it not only assessed the progress of reform, but also assisted the CEE countries in modernising their public administrations. Sigma's detailed recommendations constituted

⁹¹ For more information, see: <<http://www.sigmaweb.org>> accessed 5 December 2007.

⁹² Sigma assessments reports are available at:

<http://www.sigmaweb.org/document/37/0,3343,en_33638100_34612958_35550053_1_1_1_1,00.html> accessed 6 December 2007.

an important blueprint for reforms conducted by the CEE countries. Furthermore, the Sigma programme also investigated progress in the fight against corruption within public administration, which was necessary for the existence of high quality public policy and regulation.⁹³

The EU also cooperated with the Council of Europe to support the economic and democratic changes taking place within the post-communist countries. In 1996 the Commission and the Council of Europe launched the Octopus programme with the principal goal of promoting higher standards within the CEE countries in their fight against corruption, money laundering and organised crime.⁹⁴ The Octopus programme contributed to the exchange of best practice in terms of the legislation, enforcement and prevention of corruption. The practitioners from the CEE countries and other members of the Council of Europe were able to participate in a variety of conferences, workshops and training sessions organised within the framework of the programme and to agree on recommendations regarding measures to be taken in their respective countries.⁹⁵ In addition, experts from the CEE countries had an opportunity to participate in study visits and discuss with their counterparts from host countries how the instruments of the EU and the Council of Europe should be implemented. The Octopus programme provided a useful platform for discussion, learning and training for civil servants, judges, prosecutors and police officers involved in the fight against corruption and organised crime.

All of these initiatives should be assessed very positively, as they served as a catalyst for the elaboration of European anti-corruption standards. While the EU was

⁹³ Commission (EC), 'Commission Decision of 1998 Establishing the third tranche for the third support programme for improvement in government and management SIGMA III' <http://ec.europa.eu/enlargement/fiche_projet/document/ZZ9808%20-%201998%20SIGMA%20III.pdf> accessed 6 December 2007.

⁹⁴ For more, see: <http://www.coe.int/t/e/legal_affairs/legal_co-operation/combating_economic_crime/3_technical_cooperation/OCTOPUS/> accessed 5 December 2007.

⁹⁵ For example: 'The Prevention of Corruption in Central and Eastern Europe' 2002 'Anti-Corruption services- Good practice in Europe' (2004) <http://www.coe.int/t/e/legal_affairs/legal_co-operation/combating_economic_crime/3_technical_cooperation/octopus/> accessed 6 December 2007.

trying to define such standards in its accession policy documents, the development was to some extent taking place spontaneously as a result of projects and research financed by these programmes. The number of initiatives in the area of anti-corruption was relatively high in comparison to other JHA areas.⁹⁶ This suggests that there was a political will within the EU to fund projects and there was willingness on the side of CEE countries to provide project proposals. However, often these projects were only based on *ad hoc* perceptions of needs, rather than on strategic planning by the EU. Although twinning projects introduced an element of strategic planning to reforms, it started very late, as it was only in 2003 when all the candidate countries received this type of support through PHARE.⁹⁷

3. The impact of the EU accession on the anti-corruption policies

The enlargement of May 2004 forced the EU to go beyond the single market objectives and focus on the promotion of democracy and the rule of law. Unlike in the case of the Council of Europe, however, the primary goal of the EU is to create a single market and not to promote or enhance the quality of democracy within the Member States. The EU consequently had a much more limited area for manoeuvre. This policy mandate limited the initiatives of the EU not only internally, but also within its enlargement policy. The fight against corruption was an important objective, but less urgent than economic and administrative adjustments that guaranteed the proper functioning the single market after the accession of the CEE countries to the EU.

⁹⁶ ECOTEC, 'Support to the Justice and Home Affairs Acquis. Thematic Evaluation of the European Union Phare Programme', (2006), at 16
<http://ec.europa.eu/enlargement/pdf/financial_assistance/phare/zz_jha_0533_final_version_160306_en.pdf> accessed 6 December 2007.

⁹⁷ Slovakia, Latvia and Lithuania, together with Bulgaria and Romania received support in the area of anti-corruption under PHARE earlier than the rest of the countries. In 1998 the Catch-Up Facility was set up to accelerate their preparations for membership, including, financing of the anti-corruption projects. See: PHARE Annual Report 1998
<http://ec.europa.eu/enlargement/archives/financial_assistance/phare/ar98/index_ar98.htm> accessed 6 December 2007.

However, as discussed in Chapter Four, the desire to join the EU acted as an important catalyst for reform in the CEE countries. The impact of the accession process on anti-corruption policy in a given candidate country depended on many factors. One of the most crucial was the existence of the political will of the national government to reform. Strong and committed political leadership was important to push and shape anti-corruption reforms.⁹⁸ Another important factor was the openness of the political system with an active civil society and freedom of the media, which could focus attention on the problem of corruption.

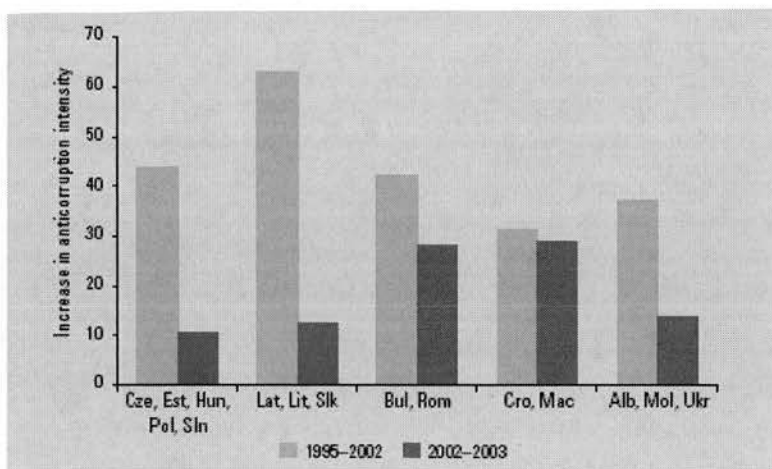
While it is not difficult to trace the limited legislative changes required by the formal anti-corruption *acquis*, it is not entirely possible to separate the EU influence on the anti-corruption policies in the candidate countries from other domestic and external factors. Since the mid-1990s, there was an increase in the amount of attention international organisations, including the World Bank, the International Monetary Fund, the OECD, Transparency International and in particular the Council of Europe, paid to corruption in the post-communist countries. Nonetheless, as already observed in Chapter Four, among other international organisations the EU had the greatest potential to influence domestic policies across the CEE countries. Findings of the World Bank from 2006 confirmed that the accession process was a major incentive for the CEE countries to address corruption, as they found a strong correlation between EU conditionality and the intensity of anti-corruption legislative activities in the CEE countries.⁹⁹ (See Figure 6.1)

Figure 6.1: Anti-corruption intensity and the pull of the European Union

⁹⁸ The World Bank (n 58), at xviii and 82

<<http://siteresources.worldbank.org/INTECA/Resources/ACT3.pdf>> accessed 6 December 2007.

⁹⁹ Ibid, at 80-82.



Source: *The World Bank, J. H. Anderson, J.H. and Ch.W. Gray, 'AntiCorruption in Transition 3. Who is Succeeding and Why?' (2006), at 81*
<http://siteresources.worldbank.org/INTECA/Resources/ACT3.pdf> accessed 9 December 2007

The World Bank's findings confirmed that for the so-called 'first wave of accession countries' (Poland, Hungary, the Czech Republic, Estonia and Slovenia), the intensity of anti-corruption efforts and the pull of the EU were the strongest from 1995 to 2002, and for Latvia, Lithuania and Slovakia this pull was even stronger during these years due to greater uncertainty regarding their potential membership. Chapter Four argued that it was a mistake on the side of the EU not to address the problem of corruption at the earliest stages of the accession process. The findings of the World Bank seem to confirm this view, showing that in the area of anti-corruption, EU conditionality worked best when accession was still not certain, particularly before the accession negotiations were concluded in 2002.

3.1. Case study: Poland

At the beginning of the 1990s, soon after democratic changes had begun, the problem of corruption in Poland was still neglected. Only by the second half of the 1990s was there a general recognition of the dangers of corruption for the success of the economic and political transformation. The change in attitudes occurred from bottom-up and originated

from civic activities and investigative journalism, which played an important role in exposing cases of corruption.

The first anti-corruption initiatives in Poland took place independently from the accession process and were not the outcome of EU pressure in this area. Since 1997, several anti-corruption legislative measures have been introduced, but they were all proposed by Members of Parliament and not the government.¹⁰⁰ At the same time, the fight against corruption began to appear on the agenda of political parties during election campaigns, as it was considered to be a good catch phrase that could help to win elections. In the late 1990s, however, the government at last acknowledged the need to address the problem of corruption in a more coherent way.

In 1999, in response to a request from the Polish government, the World Bank prepared a report that was the first thorough analysis of the problem of corruption in Poland.¹⁰¹ The World Bank's report identified 'high level' corruption as one of the most serious problem in the country and stated, 'All those interviewed identified high level corruption as the most serious corruption problem that Poland faces, and considered that it was growing'.¹⁰² It further highlighted the need to address corruption in areas such as lobbying, conflict of interests, political party finance, judicial and prosecution bodies, subnational government, public procurement, privatisation, customs and tax administration, concessions and licences, and healthcare.¹⁰³ One other important factor that helped to uncover the scale of corruption in Poland was the activity of the Supreme Chamber of Control, which since 2000 has been producing special reports about corruption in Poland and has accepted the rule that every control would investigate the

¹⁰⁰ Open Society Institute, 'Corruption and Anti-Corruption Policy in Poland' (2002), at 405
<<http://www.eumap.org/reports/2002/corruption>> accessed 6 December 2007.

¹⁰¹ The World Bank, 'Corruption in Poland: Review of Priority Areas and Proposals for Action' (1999)
<<http://www1.worldbank.org/publicsector/anticorrupt/PolandREPORT.pdf>> accessed 6 December 2007.

¹⁰² Ibid, at 7.

¹⁰³ Ibid, at 6-24.

areas and sources of corruption as well as the procedures and mechanisms encouraging it.¹⁰⁴

According to the Transparency International CPI, Poland has been and continues to be the most corrupt country among the eight post-communist states that joined the EU in May 2004.¹⁰⁵ Due to its size, Poland was also the greatest beneficiary of EU financial assistance programmes, even though the levels of corruption carried a danger of misappropriation of the EU pre-accession funds. As a result, the EU had a particularly strong interest in reinforcing anti-corruption reforms in Poland.

Although it is not entirely possible to isolate the impact of the EU accession on anti-corruption changes, there are several policy areas where the attention paid by the Commission acted as a catalyst for change. More precisely, one can see the amendments introduced to national laws as a result of the duty to comply with the formal *acquis* in the area of anti-corruption. For instance, in order to comply with the *acquis*, Poland had to introduce a number of amendments to its criminal law. It extended its application to foreign officials and officials of international organisations, introduced the criminal liability of legal persons in 2002 and criminalised corruption in the private sector in 2003.¹⁰⁶ In order to comply with the requirements of the *acquis*, Poland had to pass laws including amendments to the Penal Code, Penal Procedure Law, the law relating to the fight against unfair competition, the law on public procurement and the law on banking activities.¹⁰⁷ Moreover, Poland signed several international conventions that were part of the EU *acquis*¹⁰⁸ and which significantly extended the scope of national law.¹⁰⁹ It also

¹⁰⁴ Interview with Grażyna Kopińska (n 5).

¹⁰⁵ For more information, see: Table 7.1 below and

<http://www.transparency.org/policy_research/surveys_indices/cpi> accessed 6 December 2007.

¹⁰⁶ C. Nowak, *Dostosowanie prawa polskiego do instrumentów międzynarodowych dotyczących korupcji* (Fundacja im. Stefana Batorego, Program Przeciw Korupcji, Warszawa 2004), at 35-78

<http://www.batory.org.pl/doc/kor_instr.pdf> accessed 6 December 2007.

¹⁰⁷ A. Grzelak, 'Poland' in A. Moore (ed) and M. Chiavario, *Police and Judicial Co-operation in the European Union FIDE 2004 National Reports* (CUP 2004), 251-270, at 253.

¹⁰⁸ Council of Europe Convention on Money Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (1998); Criminal Law Convention on Corruption (1999); OECD Convention (2000); UNCATOC (2000) and Civil Law Convention on Corruption (2001).

¹⁰⁹ Nowak (n 106).

became a member of GRECO in 1999 and participated in the works of the OECD WG. This kind of intense legislative activity was characteristic of all the CEE countries. As has been pointed out, ‘...the main outstanding legal and institutional issues for meeting the European Union’s *acquis communautaire* were better addressed through specific anti-corruption legislative measures than through high profile anti-corruption campaigns’.¹¹⁰

In Poland, the desire to join the EU acted as the most important motor of anti-corruption policy in the period between 2001 and 2004 under the government of Leszek Miller. The pressure coming from the Commission was a direct reason behind the adoption of the governments’ anti-corruption strategy in September 2002.¹¹¹ All the Regular Reports until 2001 repeatedly criticised the Polish government for the lack of a central and integrated strategy. The 2001 Regular Report on Poland underlined that:

...while efforts were being made to fight against corruption, there appeared to be a lack of a clear overall strategy. A recently constituted government task force on corruption is a first step in drawing together the various stands of policy and the actors involved in the fight against corruption.¹¹²

Not only was the strategy adopted as a result of EU pressure, but also the Commission was the main addressee of it. This was evident from the fact that although the strategy called for the production of periodical reports on the state of implementation, the government prepared such a report in 2003 in the English language specifically for the Commission and without presenting it to the public.¹¹³ The impact of the accession process on the adoption of national anti-corruption strategies was also visible in other candidate countries. As Steves and Rousso observed, ‘...the concerns of the European

¹¹⁰ F. Steves and A. Rousso, ‘Anti-Corruption programmes in post-communist transition countries and changes in the business environment, 1999-2002’ (2003) EBRD Working Paper No. 85, at 10-11.

¹¹¹ Interview with Grażyna Kopińska (n 5).

¹¹² Commission (EC), ‘2001 Regular Report on Poland’s Progress Towards Accession’, at 21 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/pl_en.pdf> accessed 6 December 2007.

¹¹³ Interview with Grażyna Kopińska (n 5).

Commission have been paramount in the crafting of anticorruption policies, and the Commission has provided extensive assistance for the development of anti-corruption policy, in particular in the formulation of national anticorruption strategies and action plans'.¹¹⁴ The assistance in this area was given mainly through the twinning projects.

For Poland, the pressure to reform was also visible in other policy areas, such as public procurement legislation, judicial and public administration reform, and the fight against corruption within the police and customs service. The laws on public procurement, for example, were changed several times to make them compatible with the *acquis* in this area. However, as already discussed in Chapter Three, the primary goal of EU public procurement rules is to ensure equal access for the EU companies to public contracts in other Member States. Therefore, the insistence of the Commission to conduct reforms in the area of public procurement was primarily dictated by the need to ensure fair competition and the proper functioning of the single market rather than combating corruption as such. The pressure for changes was also strong in regard to the civil service, police, customs and judiciary.¹¹⁵ Initially, Poland tried to oppose the inclusion of judicial reform in the accession negotiations, claiming that the EU had never before judged the functioning of the judicial system in candidate countries.¹¹⁶ The functioning of the judicial system was, however, always present in the negotiations. The EU insisted on conducting specific reform in the area of public administration, regarding topics such as increase in salaries, computerisation and the length of judicial proceedings.¹¹⁷

¹¹⁴ Steves and Rousso (n 110), at 15.

¹¹⁵ Interview with Grażyna Kopińska (n 5).

¹¹⁶ Interview with Jacek Garstka, Permanent Representation of the Republic of Poland to the European Union (1 December 2005, Brussels).

¹¹⁷ For example: Commission of the European Communities, '1998 Regular Report on Poland's Progress Towards Accession', at 44,

<http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/poland_en.pdf> accessed 6 December 2007; Commission (EC), '2001 Regular Report on Poland's Progress Towards Accession', at 87 and 20 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/pl_en.pdf> accessed 6 December 2007.

The EU supported the anti-corruption reforms with significant financial and training assistance provided under the PHARE programme. Since 1998, anti-corruption issues were dealt with in twinning programmes carried out by the Police and Border Guard, but up until 2003 there had been no PHARE programme to assist the development of general anti-corruption policy in Poland. However, between 2003 and 2006 Poland received four twinning projects in the area of anti-corruption. The first one was launched in 2003 and aimed at strengthening the implementation of the anti-corruption strategy.¹¹⁸ The 2003 Regular Report underlined the deficiencies of the strategy:

The strategy does, in itself, not really deal with high-level corruption, with the exception of those issues related to the civil service and financial disclosure by public functionaries. An official implementation report of July 2003 indicates that while progress in implementing the strategy has been made in a number of areas, the actual impact has been rather limited. One explanation is that the strategy has been overseen by an interministerial team without sufficient administrative and political back-up. Another is the failure to secure broad support for the strategy, which was one of the major assumptions for ensuring its effectiveness.¹¹⁹

Therefore, the overall objective of the first twinning project was to assist the Polish government and especially the Ministry of Interior and Administration with the strengthening of activities undertaken during the implementation of the anti-corruption strategy. The Polish government was supported by, *inter alia*, assistance in conducting legislative changes, the establishment of a monitoring system for the implementation of the anti-corruption strategy, the training of officials and central administration responsible for implementation of anti-corruption strategy, and the elaboration of ethical standards for public administration.¹²⁰

A second project in this area was launched in 2004 and aimed at further strengthening the institutional and administrative capacity to prevent and combat

¹¹⁸ Project Fiche, 'Strengthening of the implementation of the Anti-corruption Strategy' 2003/005-710.01.03 <http://ec.europa.eu/enlargement/fiche_projet/> accessed 6 December 2007.

¹¹⁹ Commission (n 21), at 16.

¹²⁰ Project Fiche (n 118).

corruption.¹²¹ The objectives of the project included the evaluation of the legal regulations and mechanisms favouring corruption, the continuation of works related to enhancing public awareness, and promoting ethical standards of conduct in the areas of public life most exposed to corruption, as well as among high-level public officials. Two more twinning projects have taken place since the accession of Poland to the EU under the PHARE Transition Facility. The first one was launched in 2005, and in general was a continuation of two previous projects aimed at combating and preventing corruption in the public administration.¹²² The last project was received in 2006 with the primary purpose of creating the Central Anticorruption Bureau in Poland.¹²³

The influence of the accession process on Polish anti-corruption policy was important, but limited. The accession process accelerated many important reforms, especially regarding the civil service, the judiciary and public procurement. Without accession, the changes would have probably had a slower pace, but nevertheless they would have occurred.¹²⁴ The areas of reform indicated by the Commission in the Regular Reports were high on the government's agenda. The importance of the Regular Reports is proven by the fact that sometimes experts representing the Polish government during the negotiations purposefully drew the attention of the EU to a particular problem so that it could be highlighted in the Regular Reports and trigger a positive reaction from the Polish government.¹²⁵

At the same time, however, the Polish experience showed that the Commission put too little stress on the effective implementation of reforms undertaken by the governments of the CEE countries. In fact, Pitera argued that the anti-corruption reforms

¹²¹ Project Fiche, 'Strengthening of the process of implementation of the anticorruption activities in Poland' 2004/016-829.05.02 <http://ec.europa.eu/enlargement/fiche_projet/> accessed 6 December 2007.

¹²² Project Fiche, 'Enhancing anticorruption activities in Poland' 2005/017-488.05.01 <http://ec.europa.eu/enlargement/fiche_projet/document/2005-017-488.05.01%20anti-corruption.pdf> accessed 6 December 2007.

¹²³ Project Fiche, 'Improvement of the anticorruption activities in Poland' 2006/018-180.05-01 <http://ec.europa.eu/enlargement/fiche_projet/document/2006_018-180%20Anticorruption.pdf> accessed 6 December 2007.

¹²⁴ Interview with Grażyna Kopińska (n 5).

¹²⁵ Interview with Jacek Garstka (n 116).

conducted in Poland on the eve of accession often had merely declaratory character.¹²⁶ Rose-Ackerman also observed that the EU frequently accepted formal compliance rather than active implementation.¹²⁷ For example, even though the Commission knew about the problems with the actual implementation of the anti-corruption reforms from the leading NGOs in the Poland, it intentionally did not see the lack of progress and it tended to focus only on what had been accomplished.¹²⁸ The political decision to accept the CEE countries was made. The EU had to allow the CEE to join the EU, as it was afraid to lose political credibility. Therefore, the Commission could not severely criticise Poland and then allow it to accede. The case of Poland confirmed that although the EU was consulting NGOs on the developments of anti-corruption policy in Poland, it did not recognize their crucial importance or the success of anti-corruption reforms. Moreover, the Polish government did not treat the involvement of civil society as a priority area in applying for the EU financial assistance, and there was no separate EU initiative to support it.¹²⁹

Shortly before accession, the EU perceived corruption as a serious problem in Poland. In the last Regular Report the Commission concluded that:

Corruption is perceived to be increasing from an already relatively high level in Poland. It is considered to affect all spheres of public life. There has been very little progress in combating corruption, and the existing perception has been borne out in various high profile corruption cases recently.¹³⁰

After the accession, EU leverage over anti-corruption reforms came to an end. This area of policy is now considered to fall entirely under the competence of the Polish government. The approach of the Commission to the problem of corruption within Poland after the accession was best illustrated by the fact that when the leading anti-corruption NGOs in Poland organised a conference on progress in the fight against

¹²⁶ Interview with Julia Pitera, Transparency International Poland (17 May 2005 Warsaw).

¹²⁷ S. Rose-Ackerman, *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (CUP 2005) at 46.

¹²⁸ Interview with Grażyna Kopińska (n 5).

¹²⁹ Ibid.

¹³⁰ Commission (n 21), at 16.

corruption. With the presence of representatives of the World Bank, Transparency International and GRECO, the Commission's officials refused to come and comment on the situation in Poland, claiming that, since the accession, this was a purely domestic matter on which the Commission had no competence to comment.¹³¹

Conclusion

The EU policy against corruption developed furthest for the needs of the 2004 enlargement. The candidate countries were under strong political pressure to comply with the Commission's recommendations set out in the Regular Reports. Because of the priority accorded to accession by their governments, the EU was able to push anti-corruption reforms faster than they would otherwise occur. The impact of the accession process was most visible in the great intensity of legislative changes conducted by the CEE countries in order to comply with the *acquis*. In addition, the progress achieved by the candidate countries in increasing the effectiveness of public administration and the courts in tackling corruption was to a large extent made possible thanks to EU technical and financial assistance.

In the long run, the spread of democracy and market-oriented reforms, which were encouraged by the EU, should reduce corruption.¹³² One of the most important factors limiting corruption over time is the existence of a functioning democratic political order. The democratic form of government, the rule of law, freedom of speech, a free media and civil society allow the exposure of corruption and create an environment in which corrupt practices can no longer be tolerated. As observed in Chapter Four, the stability of institutions guaranteeing democracy and the rule of law was an important condition for EU membership. The prospect of accession was a major drive behind democratic reforms in the CEE countries, and the fight against corruption was recognised as one of the most important components of these reforms. If one

¹³¹ Interview with Grażyna Kopińska (n 5).

¹³² K. A. Elliott, 'Corruption as an International Policy Problem' in A.J. Heidenheimer and M. Johnston (eds), *Political Corruption: Concepts & Contexts* (3rd edn Transaction Publishers New Brunswick 2005), 925-941, at 925.

accepts that democracy reduces corruption in the long term, then the EU's insistence on democratic reforms in the pre-accession process and membership in the EU itself both contributed in a beneficial way to a reduction of corruption in the CEE countries.

As Kaufmann has pointed out, poorly designed and inadequately implemented market reforms may boost corruption, but well-designed and properly executed market reforms do not.¹³³ Treisman, in his cross-national study on corruption, concluded that 'democratization has to be radical and long-lived and trade liberalization has to be extensive to decrease corruption much'.¹³⁴ The empirical evidence showed that 'countries with the highest degree of economic freedom experienced the lowest levels of corruption, whereas countries with the least economic freedom experienced the highest levels of corruption'.¹³⁵

Although there were clearly many benefits to the fight against corruption as a result of the accession process, could the EU have done more to stem the tide of corruption in the CEE countries? The EU policy was characterised by fragmentation and the lack of a strategic vision on how to fight corruption within the candidate countries. Although the Regular Reports delivered a comprehensive set of anti-corruption standards, the EU failed to apply them consistently. According to the OSI report:

The anti-corruption policy measures that the European Commission has tended to recommend to candidate States have been generally oriented towards a control paradigm, with a strong emphasis on ensuring that criminal anti-corruption law is optimal and fully enforced.¹³⁶

This was due to the fact that the stress during the accession negotiations was on adoption and implementation of the *acquis*, which has a strong criminal law character.

¹³³ D. Kaufmann, 'Corruption: The Facts' (1997) Foreign Policy Issue 107, 114-131, at 122.

¹³⁴ D. Treisman, 'The causes of corruption: a cross-national study' (2000) Journal of Public Economics 76, 399-457, at 401.

¹³⁵ M.L. Tupy, 'The Rise of Populist Parties in Central Europe. Big Government, Corruption, and the Threat to Liberalism' (2006) CATO Institute, Centre for Global Liberty & Prosperity Development Policy Analysis, No. 1, at 15 <<http://www.cato.org/pubs/dpa/dpa1.pdf>> accessed 6 December 2007

¹³⁶ OSI Report (n 41), at 31.

Although the EU formulated a fairly comprehensive set of criteria, it was reluctant systematically to judge the candidate countries on these bases. The important question is why the EU did not develop a more effective policy in this area? The primary explanation is the lack of a genuine framework against corruption within the Member States. The fact that the EU does not have such a policy towards existing Member States, as well as the fact that none of its Member States has ever been judged on the basis of similar requirements, seriously undermined the legitimacy of EU anti-corruption demands, especially those which reached beyond the formal *acquis*.

The EU did not use its full potential to influence anti-corruption changes in the CEE countries. It should have used the leverage it had before the accession and formulated a more coherent and clear anti-corruption framework for the candidate countries. As already argued in Chapter Five, the EU strategy also lacked a thorough analysis of the causes of corruption within the CEE countries. In a broad assessment, the EU approach to the problem of corruption in the CEE countries can be described as too little and too late. Policy makers in the candidate countries waited for the Regular Reports to guide them on reforms, but the guidance given in the Regular Reports did not clearly indicate the substance of reforms or their desirable sequencing.

This approach by the EU was, however, not entirely deliberate. Instead, it seems that, at the beginning, the EU did not have a clear idea about how to deal with corruption within the candidate countries. It was a learning process for the EU itself, and the requirements in this area became gradually more refined as the EU gained more experience. For example, over time, the Regular Reports contained ever more detailed descriptions of the existing loopholes in the candidate countries' legislation.

The biggest weakness of the EU strategy was the fact that it ended on the day of accession of the CEE countries to the EU in May 2004. Although the problems with corruption remained serious, the EU lost its influence to drive reforms in the CEE countries, and as in the case of all Member States, now it can only monitor the proper administration of EU funds. The shortcomings of this EU strategy became particularly

visible during the accession of Bulgaria and Romania. The next chapter discusses how the EU tried to offset the deficiencies of its strategy in the policy towards these two countries.

The impact of 2004 enlargement on the EU anti-corruption policy

The accession of the CEE countries to the EU took place despite their continuing problems with corruption. In the last assessment of the progress made by the CEE countries in 2003, the Commission concluded that:

With a few notable exceptions, the perception remains that the level of corruption in the acceding countries is still high, and very high in some cases, and can affect confidence in the public administration and the judiciary, thereby affecting also the proper implementation of the *acquis*. The fight against corruption must therefore remain a policy priority in the coming years.¹

¹ Commission (EC), 'Comprehensive Monitoring Report of the European Commission on the state of preparedness for EU membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia' COM(2003) 675 final, 5.11.2003, at 7-8.

In addition, in its final report in 2003 the CEWP concluded that corruption was still widespread in the CEE countries and remained a significant concern.²

Significantly high levels of corruption were confirmed in 2007 by a study entitled 'Nations in Transit' conducted by the NGO Freedom House Europe³, which each year assesses the democratic development of twenty nine countries, including all new Member States. The outcome of the last eight assessments can be seen in Figure 7.1.

Figure 7.1: Corruption in the new Member States

	1999- 2000	2001	2002	2003	2004	2005	2006	2007
New EU Members								
Bulgaria	4.75	4.75	4.50	4.25	4.25	4.00	3.75	3.75
Czech Rep.	3.25	3.75	3.75	3.50	3.50	3.50	3.50	3.50
Estonia	3.25	2.75	2.50	2.50	2.50	2.50	2.50	2.50
Hungary	2.50	3.00	3.00	2.75	2.75	2.75	3.00	3.00
Latvia	3.50	3.50	3.75	3.50	3.50	3.50	3.25	3.00
Lithuania	3.75	3.75	3.75	3.50	3.50	3.75	4.00	4.00
Poland	2.25	2.25	2.25	2.50	2.50	3.00	3.25	3.00
Romania	4.25	4.50	4.75	4.50	4.50	4.25	4.25	4.00
Slovakia	3.75	3.75	3.25	3.25	3.25	3.00	3.00	3.25
Slovenia	2.00	2.00	2.00	2.00	2.00	2.00	2.25	2.25

Source: Freedom House, *Nations in Transit 2007*

<http://www.freedomhouse.hu/images/fdh_galleries/NIT2007/corruption%20-%20regional2.pdf> accessed 10 December 2007.

The ratings are based on a scale from 1 to 7, with 1 representing the highest and 7 the lowest level of democratic progress.⁴ Freedom House looks at perceptions of corruption, the business interests of top policy makers, laws on financial disclosure and conflict of interests, and the efficacy of anti-corruption initiatives. From the above ratings, it is evident that corruption in the CEE countries represents an ongoing challenge. In fact,

² Council of the European Union, 'Enlargement: statement by the Collective Evaluation Working Party', 14264/1/03, 18.11.2003, at 13.

³ For information on Freedom House, see: <<http://www.freedomhouse.org/>> accessed 10 December 2007.

⁴ The 2007 ratings reflect the period 1st January through 31st December 2006.

between the accession to the EU in 2004 and 2007, levels of corruption actually increased in Hungary, Lithuania, Poland and Slovenia while they diminished only in Latvia.

Whereas Chapter Six analysed the response of the EU to the problem of corruption within the pre-accession process, this chapter focuses on EU initiatives taken after the 2004 enlargement. Chapter Two and Three both demonstrated that the EU policy against corruption within existing Member States is very limited and restrained by a number of legal and political factors. Thus, paradoxically, anti-corruption standards actually diminished once the CEE countries acceded to the EU. Unlike within the pre-accession policy, there is no room for practicing double standards towards the CEE countries now inside the EU, as any new policy developments to address corruption must apply equally to all Member States. Although the pre-accession process allowed the EU to identify and address problems in the area of anti-corruption, after accession the EU lost its leverage over national anti-corruption policies in the CEE countries, and it can no longer demand reforms in this area. Therefore the EU policy faces an important challenge: how best to secure the continuity of the anti-corruption reforms and ensure that the momentum generated by the accession process is not lost. The accession of Bulgaria and Romania in January 2007 completed enlargement that began in 2004, but it also made the issue of policy change in this area even more urgent, as both of these two new Member States possess significantly high levels of corruption.

This chapter argues that the 2004 enlargement, followed by the accession of Romania and Bulgaria, constitutes an opportunity for the EU to develop a more coherent policy against corruption. As Chapter Six illustrated, during the 2004 enlargement the EU was systematically assessing the progress made by candidate countries and formulating recommendations in case of identified shortcomings. As a result, it gained valuable experience that should now be used in formulating policy towards all Member States. In addition, high levels of corruption in some new Member States, which

endanger the proper functioning of the EU legal system, should motivate the political will to establish a more comprehensive anti-corruption framework.

The goal of this chapter is to analyse the changes that took place in EU anti-corruption policy as a result of the 2004 enlargement and elaborate on possible future developments of this policy. To this end the chapter starts with an analysis of the impact of the 2004 enlargement on the external policy of the EU. First, it explains how the experience of the 2004 enlargement strengthened the EU anti-corruption strategy towards Romania and Bulgaria. Secondly, it shows that the EU decided to change its strategy towards the existing candidate countries in order to promote anti-corruption reforms at a very early stage of the accession process. Furthermore, the chapter illustrates that corruption has also found its place in the external policy of the EU towards potential candidate countries and within the framework of the European Neighbourhood Policy (ENP). Next, the Chapter moves on to discuss the impact of 2004 enlargement on the internal policy of the EU. It analyses the EU anti-corruption initiatives after 2004 and points out that the Commission is moving towards developing a more coherent strategy against corruption within the Member States. Finally, the chapter examines the arguments for and against a separate EU anti-corruption framework and argues that the best option is a new anti-corruption policy at the EU level which could draw from the 'Open Method of Coordination' (OMC).

1. The reinforcement of the EU strategy towards Bulgaria and Romania

The EU did not introduce any mechanism to monitor progress in combating corruption within the CEE countries after their accession in May 2004. The EU position here differed from its position towards the old Member States only with regard to continuing financial support for national anti-corruption projects under the PHARE Transition Facility, which, as discussed in Chapter Six, expired in 2006. Upon accession the Commission could, as in relation to any Member State, monitor the implementation of the *acquis* with the use of tools available on the basis of the EC and the EU Treaties as

already discussed in Chapter Three. The detection of corrupt practices in the use of the EU agricultural or structural funds could also lead to delay in the disbursement of these funds, financial corrections and recovery of payments by the Commission.⁵

In addition to the above standard mechanisms, the Treaty of Accession⁶ with CEE countries introduced three specific safeguard clauses in matters of the economy, the internal market and the area of JHA, which could have been applied for three years after accession and expired in 2007. Any new or old Member State was allowed to invoke an economic clause in case of serious economic difficulties resulting from accession.⁷ The internal market clause could have been invoked when a new Member State caused, or risked causing, a serious breach of the functioning of the internal market⁸. The Commission could then have taken appropriate measures such as excluding this state from the benefits of certain internal market legislation.⁹ Finally, the JHA safeguard measure enabled old Member States to refuse automatic recognition and enforcement of judgements and arrest warrants from the CEE countries in case of 'serious' or 'imminent risks' of shortcomings in the transposition, implementation or the application of the *acquis* relating to mutual recognition in criminal and civil matters.¹⁰

Corrupt practices can undermine the correct implementation of the *acquis*. They can also impair the independence and impartiality of the justice system, which is a necessary prerequisite for implementation of the principle of mutual recognition among Member States. It would therefore seem that evidence of high levels of corruption was likely to trigger the application of the JHA clause. However, this was not the case and this safeguard clause was unlikely to be used to discipline the CEE countries with regard to their anti-corruption policies. As has been pointed out, the safeguard clauses were

⁵ Commission (EC), 'Communication from the Commission. Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania' COM(2006) 549 final, 26.9.2006, at 7.

⁶ OJ L 236, 23.09.2003.

⁷ Article 37 of the Treaty of Accession.

⁸ Article 38 of the Accession Treaty.

⁹ Commission (n 5), at 8.

¹⁰ Article 39 of the Treaty of Accession.

rather an emergency window, and the possibility for invoking them has never been seriously discussed.¹¹

The situation changed with the accession of Romania and Bulgaria in January 2007. Both countries applied for EU membership in 1995 and until 2005 were subject to the same EU accession policy as the CEE countries that joined in 2004. However, since 2005, when the Treaty of Accession¹² with two countries was signed, one could see a change in the Commission's strategy. Corruption emerged as one of the most serious issues and a possible obstacle to the accession of both countries. The Commission started to monitor Romania and Bulgaria more intensely than the 2004 entrants. There were two very practical reasons for this change: it was easier to monitor only two countries and the problems of corruption were much more serious.¹³

However, another contributing factor that led to a more rigorous approach by the Commission was the change of political climate within the EU. The rejection of the Constitutional Treaty in the French and Dutch referendums signalled public disapproval of many aspects of EU policy, including enlargement.¹⁴ In this more difficult political environment, the Commission was under pressure to provide hard evidence that there was a commitment to fight corruption in Bulgaria and Romania. It had also learned the main lesson from the previous enlargement: the need for more intense monitoring to guarantee that the implementation of anti-corruption measures is effective and brings the intended results. As a result, the strategy towards Bulgaria and Romania was reinforced in two ways: by introducing the formal possibility of postponing of accession and by introducing a verification mechanism to monitor progress in the area of anti-corruption after the accession process was finished.

¹¹ G. Noutcheva, 'Bulgaria and Romania's Accession to the EU: Postponement, Safeguards and the Rule of Law' (2006) CEPS Policy Brief No. 102, at 2 <http://shop.ceps.eu/download.php?item_id=1329> accessed 11 December 2007 and K. Inglis, 'The Union's Fifth Accession Treaty: New means to make enlargement possible' (2004) *Common Market Law Review* 41, 937-973, at 972.

¹² OJ L 157, 21.6.2005.

¹³ Interview with Sabine Zwaenepoel, European Commission, Directorate-General Justice, Freedom and Security (Brussels, 29 November 2006).

¹⁴ 'Nervousness about EU enlargement' *Financial Times* (30 June 2005).

The accession negotiations with Bulgaria and Romania were concluded in December 2004. The Treaty of Accession stated that both countries would join in January 2007, but it also gave the EU the option to postpone the accession of either country until January 2008. In particular, the Treaty provided that the Council could, acting unanimously on the basis of a Commission recommendation, decide to postpone either country's accession, '...if there is clear evidence that the state of preparations for adoption and implementation of the *acquis* in Bulgaria or Romania is such that there is a serious risk of either of those States being manifestly unprepared to meet the requirements of membership...' ¹⁵ In addition, the Treaty of Accession expressly provided for the possibility to postpone of Romania's accession to the EU if the country failed to meet special anti-corruption commitments. ¹⁶ Romania was obliged to considerably step up the fight against corruption, in particular against high-level corruption, and conduct an independent audit of the results and impact of the national anti-corruption strategy. ¹⁷ Article 39(2) of the Accession Treaty provided for the possibility of postponing the accession of Romania until January 2008, by the Council acting by qualified majority, if serious shortcomings were observed in the fulfilment of the above commitments. The difference in treatment between Romania and Bulgaria was not so much a result of differences in their governance standards, but rather a matter of perceived political will of their respective governments to tackle problems indicated by the EU. ¹⁸ As Łazowski has argued, the postponement clause 'served as a stick to discipline the forthcoming members in their last minute pre-accession efforts.' ¹⁹

In addition to the postponement clause, Romania and Bulgaria were also presented with a list of special anti-corruption commitments to be adhered to after the

¹⁵ Article 39(1) of the Treaty of Accession

¹⁶ Article 39(2) of the Treaty of Accession

¹⁷ Annex IX of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the EU, OJ L 157/201, 21.6.2005

¹⁸ Noutcheva (n 11).

¹⁹ A. Łazowski, 'And Then They Were Twenty-Seven... A Legal Appraisal of the Sixth Accession Treaty' (2007) *Common Market Law Review* 44, 401-430, at 416.

accession negotiations were closed.²⁰ In the previous round of enlargement, only Poland was presented with one special recommendation concerning the introduction of liability of legal persons for corruption.²¹ The list presented to Romania and Bulgaria clearly indicates that the Commission took a much stronger stance on corruption in this round of enlargement.

Following the conclusion of the accession negotiations, the EU decided to monitor closely the state of preparations of Romania and Bulgaria. The Commission was asked to continue to submit annual reports on Bulgaria's and Romania's progress towards accession, together with recommendations. The annual reports in 2005 and 2006 highlighted that corruption remained a serious problem in both countries. For example, in 2005 the Commission noted that in Bulgaria:

...widespread corruption remains a cause for concern and affects many aspects of society. There is a positive downward trend as far as administrative corruption is concerned, but the overall enforcement record in the field of corruption remains very weak.²²

With regard to progress made by Romania, the 2005 report observed that:

...corruption remains a serious and widespread problem that affects many aspects of society. The impact to date of Romania's fight against corruption has been limited, there has been no significant reduction in perceived levels of corruption and the number of successful prosecutions remains low, particularly for high-level political corruption.²³

In its final report on both countries, adopted in September 2006, the Commission observed that further progress was still necessary in the area of judicial reform and the fight against organised crime and corruption.²⁴ In 2006 Commission officials said, for

²⁰ Interview with Sabine Zwaenepoel (n 13).

²¹ Ibid.

²² Commission (EC), 'Bulgaria 2005 Comprehensive Monitoring Report', SEC(2005) 1352, 25.10.2005, at 11.

²³ Commission (EC), 'Romania 2005 Comprehensive Monitoring Report', SEC (2005) 1354, 25.10.2005, at 13.

²⁴ Commission (n 5), at 4-5.

example, that ‘...Bulgaria has not managed to successfully prosecute any of the estimated 173 contract killings or assassination attempts since 1992.’²⁵ One of the experts sent by the EU to assess Bulgaria’s progress in its fight against organised crime and corruption, Klaus Jansen, observed that ‘the country’s efforts to tackle organised crime were “a total mess”, and criminal bosses and people traffickers were going unpunished.’²⁶ Moreover, he added that his attempts to uncover the truth about the crime in Bulgaria were frustrated as ‘they believed they would get into the EU anyway, and I encountered a “kiss my ass” attitude’ and ‘whenever I tried to go into details they said disclosure was against the national interest.’²⁷ A second expert, Susette Schuster, in a report to the Commission noted that in Bulgaria ‘there was “open nepotism” in the appointment of judges, and that judicial reforms were “chaotic”.’²⁸ In comparison to these alarming unofficial assessments, the Commission reports from 2005 and 2006 appeared to be very carefully worded, as their focus was presumably on preparing public opinion within the EU for the accession of these two countries.

Despite continuing problems with corruption and the lack of progress noted in the Commission’s reports, to postpone the accession of Bulgaria and Romania until 2008 would have carried considerable political risks. Bulgarian Prime Minister Sergei Stanishev said that ‘a possible postponement will discourage the people who bear the burden of changes; it will undermine public confidence. This will send a wrong sign to the western Balkan countries.’²⁹ He further added that ‘a postponement would be perceived as a rejection’, and ‘it would be a mistake. We are not second-class European citizens. Do not try to humiliate us.’³⁰ One of the Members of the EP noted that ‘the consequence of postponement would be entirely negative – a slap in the face rather than

²⁵ ‘Bulgaria: Don’t humiliate us’ *EuroActiv.com* (11 May 2006) <<http://www.euractiv.com/en/enlargement/bulgaria-humiliate-us/article-155156>> accessed 11 December 2007.

²⁶ ‘Organised crime clouds Bulgaria’s EU accession’ *Financial Times* (26 April 2006).

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ ‘Bulgarian PM steps up EU pressure’ *TheParliament.com* (15 May 2006) <<http://www.eupolitix.com/EN/News/200605/a33f953a-c9ac-4fb8-8ce6-8bd4a3e2099f.htm>> accessed 11 December 2007.

³⁰ *EuroActiv.com* (n 25).

motivation. A bad signal to the Bulgarian people, it would encourage extremist forces and shake business confidence.’³¹ The *Guardian* observed that delaying membership might ‘... make no difference and might even set back the reform program.’³²

The EU acknowledged all these risks and decide not to postpone the accession of Romania and Bulgaria. Although the two countries did not fulfil the membership criteria, the EU, as Noutcheva has described it, fell into ‘its own “rhetorical trap” from which there was no easy way out.’³³ On one hand, it could not postpone the accession without losing its credibility, and on the other, the accession of two countries with high levels of corruption and insufficient frameworks against organised crime could undermine the functioning of the EU. In addition, as the *Economist* has noted, one important argument for allowing Romania and Bulgaria to join was the stability and prosperity in the eight post-communist countries.³⁴

Ultimately the EU opted for a ‘third scenario’. It decided to establish a regime of post-accession monitoring which no new Member State had ever faced before. Romania and Bulgaria were allowed to enter the EU under the condition that they would meet certain anti-corruption ‘benchmarks’ after the accession³⁵. Benchmarking is defined as ‘a system that aims at comparing in a systematic manner organisational processes and/or performances with the objective of improving these processes and thus creating new (and higher) standards.’³⁶ (emphasis in original) It was used in the pre-accession process, but as discussed in Chapter Four, the anti-corruption benchmarks were often vague and not systematically applied across all candidate countries. The new monitoring mechanism allows the EU to retain leverage in the area of anti-corruption until three years after the accession. It has been pointed out that EU acted on an assumption that ‘on

³¹ *TheParliament.com* (n 29).

³² ‘Bulgaria and Romania to join EU in 2007 despite corruption fears’ *The Guardian* (4 April 2006).

³³ Noutcheva (n 11).

³⁴ ‘We’re off on a European odyssey’ *The Economist* (28 September 2006).

³⁵ Commission (n 5), at 9-11.

³⁶ R.A. Del Sarto, T. Schumacher and E. Lannon, ‘Benchmarking Democratic Development in the Euro-Mediterranean Area: Conceptualising Ends, Means and Strategies’ (2007) EuroMeSCo Annual Report 2006, at 16 <<http://83.138.170.194/images/04.pdf>> last accessed 12 November 2007.

balance it may be preferable to work with them when they are inside than to try to push for reforms from the outside.’³⁷

To push for reforms, the EU not only extended the application of pre-accession monitoring in time, but also improved it. As observed in Chapter Six, a major weakness of the EU strategy towards the CEE countries was the lack of clear anti-corruption benchmarks. On 13 December 2006, the Commission adopted a decision on the basis of Articles 37 and 38 of the Treaty of Accession, establishing a cooperation and verification mechanism to review the progress in meeting specific benchmarks in the area of judicial reform and the fight against corruption in Romania³⁸ and Bulgaria³⁹. Articles 37 and 38 of the Treaty of Accession contain the same internal market and JHA safeguard measures as the ones foreseen for the 2004 entrants. If Bulgaria or Romania failed to address the benchmarks adequately, the Commission may apply these safeguard measures. Thus, the major difference with the previous enlargement is that insufficient efforts in combating corruption may lead to the suspension of other Member States’ obligation to recognise judgements and execute warrants issued by either country’s courts or prosecutors falling under the principle of mutual recognition. The safeguard measure may be invoked up to three years after accession, but it may also be applied beyond that date until the situation is remedied.⁴⁰ It has been pointed out that there is also a possibility to apply more symbolic sanctions, as ‘...the two countries might be denied access to some common initiatives and future policies in the area of police and judicial cooperation...’⁴¹

³⁷ Editorial comments, ‘The Sixth Enlargement’ (2006) *Common Market Law Review* 43, 1497-1501, at 1499.

³⁸ Commission Decision (2006/928/EC) establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ L 354/56, 14.12.2006.

³⁹ Commission Decision (2006/929/EC) establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, OJ L 354/58, 14.12.2006.

⁴⁰ Commission (EC), ‘Memo/07/260’ (2007)

<<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/260&format=HTML&aged=0&language=EN>> accessed 11 December 2007.

⁴¹ Noutcheva (n 11).

The benchmarks to be addressed by Romania, as of December 2006, were:

1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.
2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
3. Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high- level corruption.
4. Take further measures to prevent and fight against corruption, in particular within the local government.⁴²

The benchmarks to be addressed by Bulgaria, as of December 2006, were:

1. Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.
2. Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase.
3. Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually.
4. Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high- level officials.
5. Take further measures to prevent and fight corruption, in particular at the borders and within local government.
6. Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas.⁴³

The above benchmarks call for fundamental reforms. They suggest that neither of the two countries fulfils the principal membership condition of having an effective and independent judicial system, which is necessary for implementation of the *acquis*. Moreover, in Bulgaria the independence of judiciary was not ensured by the country's constitutional system.

⁴² Commission Decision 2006/928/EC.

⁴³ Commission Decision 2006/929/EC.

Bulgaria and Romania are required to submit reports on their progress in meeting the benchmarks by the end of March of each year. The Commission can also organise expert missions to both countries to make its own assessments on the ground and seek information from other sources, including NGOs.⁴⁴ On the basis of the national reports and its own findings, the Commission prepares its own report at least every six months, which is subsequently communicated to the EP and the Council.⁴⁵

The Commission received the first reports from Bulgaria and Romania by March 2007 and it subsequently undertook expert missions to both countries in April 2007 to conduct independent assessments of progress. In June 2007, the Commission delivered two reports on the progress made by Romania⁴⁶ and Bulgaria⁴⁷ on judicial reform, corruption and, for Bulgaria, also in the area of the fight against organised crime since their accession in January 2007. The reports were based on a variety of information sources. The Bulgarian and Romanian governments were a primary source of information, but the Commission also analysed information received from the EC Representation Office, Member State diplomatic missions in Bulgaria and Romania, civil society organisations and expert reports. The reports were subsequently transmitted to the two governments for the correction of any factual inaccuracies.

The findings made by the Commission with respect to the situation in Romania and Bulgaria were to a large extent critical and did not support the conclusion that these countries fulfil the political conditions for membership. While some progress has been made in adopting legislative measures, the Commission often stressed the need to wait and see how the implementation of the relevant measures work in practice. For example, in the report on Romania, the Commission noted that:

⁴⁴ Commission (EC), 'Questions and Answers' (2007)
<http://ec.europa.eu/dgs/secretariat_general/cvm/docs/speaking_notes_general_20070706_en.pdf>
accessed 11 December 2007.

⁴⁵ Article 2 of the Commission Decision 2006/929/EC and 2006/928/EC.

⁴⁶ Commission (EC), 'Report from the Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession', COM(2007) 378 final, 27.6.2007.

⁴⁷ Commission (EC), 'Report from the Commission to the European Parliament and the Council on Bulgaria's progress on accompanying measures following Accession', COM(2007) 377 final, 27.6.2007.

The Romanian Government is committed to judicial reform and cleansing the system of corruption. In all areas, the Romanian authorities demonstrate good will and determination. They have prepared the necessary draft laws, action plans and programmes. However, the real test can only be met through determined implementation of these actions on the ground every day. There is still a clear weakness in translating these intentions into results.⁴⁸

As the *Financial Times* has observed, after the Romania's accession in January 2007 'reforms aren't on the public agenda any more', and according to business people, corruption has surged.⁴⁹

Bulgaria, meanwhile, was seen as meeting only one benchmark. It passed a constitutional amendment to establish an independent and accountable judiciary. It also made some progress towards transparency of the judicial process, improving the professionalism of judges and combating corruption at the border and with local government. At the same time, however, the Commission pointed out that:

"Contract killings" continue to be of great concern, and in particular most recent killings of local politicians since January. To date, no prosecution and conviction has taken place.⁵⁰

In both countries, the judicial treatment of high-level corruption continued to be a source of major concern and the progress achieved in the judicial treatment of high-level corruption was insufficient. The Commission concluded that '...a lot of additional efforts would be necessary to control corruption and organised crime.'⁵¹ Romania and Bulgaria were also asked to prepare the national action plans by October 2007 showing how they intended to meet the benchmarks.⁵²

⁴⁸ Commission (n 46), at 5.

⁴⁹ G. Parker, K. Hope and Ch. Condon, 'Analysis: Europe's errant entrants' *Financial Times* (12 June 2007).

⁵⁰ Commission (n 47), at 20.

⁵¹ Commission (n 44).

⁵² Action Plans <http://ec.europa.eu/dgs/secretariat_general/cvm/index_en.htm> accessed 11 December 2007.

The above monitoring exercise is unprecedented at the EU level. It is important to note that in the last monitoring report in 2006, the Commission specifically mentioned that food safety, aviation safety and EU agricultural funds also required verification after accession.⁵³ However, only in the area of judicial reform and the fight against corruption did the Commission decide to develop a specific verification mechanism.

The post-accession monitoring system differs substantially from the pre-accession strategy. It involves defining precise policy goals for the new Member States and monitoring to what extent these goals have been met. The premise of the current system is simple: setting specific anti-corruption benchmarks, periodical monitoring of compliance with the benchmarks using independent sources of information and on-the-spot visits to the country concerned, and, finally providing the financial and technical assistance to support the necessary reforms.

The Commission's system of benchmarking resembles the Council of Europe's GRECO evaluations of the Twenty Guiding Principles against Corruption. The Commission's reports contain much more detailed assessments than any other documents in the pre-accession process. It appears that the EU realised that the anti-corruption strategy developed for the purpose of 2004 enlargement policy was insufficient.

The EU clearly responded to the problem of corruption in Romania and Bulgaria more seriously than in the previous round of enlargement. The EU policy has become notably more systematic. Not only did candidate countries have to fulfil more strict criteria, but also the EU developed clearer guidelines. It has been pointed out that 'the imposition of this monitoring regime could be interpreted as an admission that the accession process has failed to ensure that candidate countries meet EU standards.'⁵⁴

⁵³ Commission (n 5), at 11-12.

⁵⁴ A. Brown and M. Attenborough, 'EU enlargement: the Western Balkans' (2007) Research Paper 07/27, House of Commons Library, at 17

<<http://www.parliament.uk/commons/lib/research/rp2007/rp07-027.pdf>> accessed 11 December 2007.

The former Romanian justice minister, Monica Macovei, who was responsible for the main anti-corruption reforms in Romania before the accession, admitted that although the basis was there, the reforms of the judiciary and the fight against corruption must continue after accession to the EU and that the post-accession monitoring process was needed.⁵⁵

To date, the cooperation and verification system has turned out to be ineffective. As the *Economist* has noted, there is now a belief that 'Romania and Bulgaria came in too soon' and have been sliding away from reforms ever since accession.⁵⁶ The monitoring process was criticised by the UK, France, the Netherlands and Sweden, which all claimed that the Commission was not taking the work seriously⁵⁷. Commissioner Frattini, who is in charge of reviewing the progress made by the two countries, was accused of 'growing too close to the governments he was supposed to be scrutinising', including going on a skiing trip with the Bulgarian interior minister.⁵⁸

Despite the fact that post-accession monitoring is much more coherent and potentially could bring more effective results than pre-accession policy, its effectiveness ultimately depends on the application of sanctions, which is limited for political reasons. Although in general assessment the efforts undertaken by Romania and Bulgaria since the accession have been insufficient, the Commission has not recommended invoking the safeguard clauses foreseen in the Treaty of Accession. The Commission has observed that sanctions are '...neither necessary nor appropriate at this stage' and stressed that 'safeguards are not punitive measures to take in case of non-delivery but are measures of last resort in order to protect the interests of the EU.'⁵⁹

⁵⁵ 'Interview with Ms Monica Macovei' *EUobserver.com* (08 January 2007).

⁵⁶ 'Charlemagne: Post-enlargement stress' *The Economist* (10 November 2007).

⁵⁷ Parker, Hope and Condon (n 49).

⁵⁸ *Ibid.*

⁵⁹ Commission (n 44).

The text of the reports was subject to political tension within the Commission. The Commissioner responsible for JHA, Mr Frattini, suggested introducing changes to the texts of the reports, admitting that 'the critical remarks are too strong and should be toned down.'⁶⁰ Under pressure from Romanian and Bulgarian Commissioners, the words 'no room for complacency' in pursuing reform and fighting corruption were replaced by a more diplomatic phrase 'there is need to step up efforts.'⁶¹ Mr Frattini defended such moves by saying that it was necessary to choose 'proper language.'⁶²

It therefore seems that the monitoring mechanism relies more on peer pressure, than on any believable threat of using the safeguard clauses. One could argue that any pressure for reform would have been more effective if it was used before accession, when the EU leverage over the domestic policies of Romania and Bulgaria was much stronger. Although the system was designed to keep the political pressure up, it seems unlikely, if not impossible, that the Commission will decide to use sanctions now that these countries have gained the status of Member States.

Above all, this mechanism offers only a temporary push and does not solve the problem in the long term. It is not realistic to expect that the problems of corruption will be cured within three years of the accession, before the safeguard mechanism expires. Moreover, even if the sanctions are applied, they would affect innocent people and companies, as the court judgments affecting their legal position will not be recognised elsewhere in Europe.⁶³

The EU decided to create this mechanism in recognition that its framework was not able to offer a viable solution to the problem of corruption in the Member States. A

⁶⁰ 'Bulgaria and Romania escape sanctions, but not criticism' *EUobserver.com* (27 June 2007).

⁶¹ 'Maintain standards' *Financial Times* (29 June 2007); The Commission however, declared that 'contrary to rumours spread, the reports have not been toned down by the Commission. In fact, the methodology and political line set by the President of the Commission was clear from the beginning: firm but fair, a comprehensive approach on the overall reform process without adding any new requirements.' see: Commission (n 44).

⁶² 'Frattini defends mild stance on Bulgaria and Romania' *EUobserver.com* (27 June 2007).

⁶³ Parker, Hope and Condon (n 49).

much better solution would be to develop an anti-corruption framework that evaluates all Member States on an equal basis, which would remove the controversy of applying double standards within the EU.

The 2004 and 2007 enlargements provided a number of lessons which are now being incorporated into the pre-accession strategy towards the candidate countries: Croatia, Turkey and Macedonia. Although the formal accession negotiations were launched in October 2005 with Turkey and Croatia, no target dates have been yet set for their accession. As demonstrated by the World Bank study discussed in Chapter Six (See: Figure 6.1), the pull of the EU was the strongest when the candidate countries were still uncertain as to their accession. Therefore, by not setting accession dates, EU leverage over anti-corruption reforms in these countries remains very strong.

The fight against corruption has already emerged as one of the most important issues within pre-accession policy. In 2006, the Commission adopted a Communication in which it advocated more rigorous enlargement strategy.⁶⁴ In November 2007, the Commission confirmed that the quality of the enlargement process was improved by tackling public administration and judicial reform and the fight against corruption at an early stage of the pre-accession process.⁶⁵ The Commission recognised the fight against corruption within the candidate countries as one of the 'top priorities.'⁶⁶ One of the new tools introduced in the new enlargement strategy is benchmarking, whereby candidate countries are expected to demonstrate success in meeting precise benchmarks before the negotiation chapter can be opened or closed. Another important change is insertion into the accession negotiations of the new Chapter 23 'Judiciary and Fundamental Rights', under which the Commission has been monitoring specifically the independence of the judiciary.⁶⁷

⁶⁴ Commission (EC), 'Enlargement Strategy and Main Challenges 2006-2007. Including annexed special report on the EU's capacity to integrate new members' COM(2006) 649 final, 8.11.2006.

⁶⁵ Commission (EC), 'Enlargement Strategy and Main Challenges 2007-2008' COM (2007) 663 final, 6.11.2007, at 2.

⁶⁶ Ibid, at 6.

⁶⁷ For example: Commission (EC), 'Croatia Progress Report 2005' SEC(2005) 1424, 9.11.2005, at 83.

The Commission decided to adopt this more rigorous approach in order to avoid the lack of progress that the EU experienced in the late stages of Bulgaria's and Romania's accession negotiations.⁶⁸ In future, the timetable for accession is likely to slow down. The EU wants to make sure that all necessary reforms are carried out before the accession and that unprepared countries will not be allowed to accede. This trend within accession policy is likely to continue during any future rounds of enlargement and has important implications for EU policy towards the potential candidate countries from the Western Balkans.

2. The extension of anti-corruption policy to external relations of the EU

The promotion of the fight against corruption as part of the external policy of the EU is not a new theme. For example, anti-corruption clauses, which foresee cancellation of financing in cases of corruption, have been an important element of the EU cooperation agreements with developing countries. The Cotonou Agreement, signed in 2000 between the EU and 77 African, Caribbean and Pacific jurisdictions, states that both parties undertake to work together to fight against corruption and bribery.⁶⁹ In particular, the Cotonou Agreement provides that serious cases of corruption can give rise to a consultation procedure with the ultimate possibility of suspending assistance.⁷⁰ As the Commission has explained, 'the consultation procedure does not apply exclusively when EC funds are involved but more generally when corruption constitutes an obstacle to the country's development.'⁷¹

⁶⁸ Commission (n 64), at 5.

⁶⁹ Article 33(2) of the Cotonou Agreement

<http://ec.europa.eu/development/ICenter/Pdf/agr01_en.pdf> accessed 11 December 2007.

⁷⁰ Article 97 of the Cotonou Agreement.

⁷¹ Commission (EC), 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy Against Corruption', COM(2003) 317 final, 28.5.2003, at 22.

Accession policy, however, pushed corruption higher up than ever before on the EU external policy agenda. Enlargement has been one of the EU's most powerful policy tools to promote democratic reforms in candidate countries. As a result, the EU is using mechanisms that worked well within enlargement policy to promote democracy and the fight against corruption in third countries. This is particularly visible in relations with potential candidate countries from the Western Balkans and within the framework of the ENP.

2.1. Potential candidate countries

The inclusion of anti-corruption policy in the pre-accession process has already had one important practical impact. The EU is using its newly gained experience in the policy towards potential candidate countries. The Feira European Council in 2000 recognised that the countries of Western Balkans, including Albania, Bosnia and Herzegovina, Montenegro and Serbia, are potential candidates for EU membership.⁷² As a consequence, the EU has been using the incentive of membership to exert influence on the domestic policies of these countries.

The strategy towards the Western Balkan countries is known as the Stabilisation and Association Process and is modelled on the policy tools used during the 2004 enlargement, which were discussed in more detail in Chapter Four. It combines conditionality, which is necessary for the access to different stages of the Stabilisation and Association Agreements, and the assistance programmes⁷³, which help each country to progress towards the requirements of EU membership.⁷⁴ The Stabilisation and Association Agreements are seen as 'the most important cornerstone for achieving a

⁷² Santa Maria Da Feira European Council, Presidency Conclusions, (19 and 20 June 2000), para 67.

⁷³ Financial Assistance for 2000-2006 was offered under the Community Assistance for Reconstruction Development and Stabilisation (CARDS) programme and for the period 2007-2013 through Instrument for Pre-Accession Assistance (IPA), based on Council Regulation (EC) No 1085/2006, OJ L 210, 31.7.2006.

⁷⁴ Commission (EC), 'Report from the Commission. The Stabilisation and Association process for South East Europe. First Annual Report' COM(2002) 163 final, 3.4.2002, at 4.

candidate status', and the EU sees them as a chief instrument to ensure reforms.⁷⁵ The example for the region has been set by the two Western Balkan countries, Croatia and Macedonia, which have already gained status as candidate countries.

Another important conditionality instrument is the European Partnership.⁷⁶ It was adopted by the Council with the aim of assisting the Western Balkan countries in preparing for membership by identifying priorities and timetables for reform.⁷⁷ The European Partnerships have the same structure and objectives as the Accession Partnerships used in the accession of the CEE countries. The European Partnership with Albania, for example, contains a separate section devoted to anti-corruption policy that includes specific priorities, such as aligning national law to Council of Europe and UN conventions against corruption, strengthening the institutional capacity to investigate and prosecute corruption, and enforcing the law on the declaration of assets.⁷⁸ The European Partnerships with the remaining Western Balkan countries contain similar provisions relevant to the needs of a particular country. Unlike the Accession Partnerships for the CEE countries and Bulgaria and Romania, which were concluded around the time when the accession negotiations were opened, the European Partnerships prioritise anti-corruption reforms much earlier, even before a country gains a candidate status. The EU is also using twinning, another instrument developed for the needs of 2004 enlargement, to strengthen the Western Balkan countries' administrative and judicial capacity.

⁷⁵ F. Trauner, 'EU Justice and Home Affairs Strategy in the Western Balkans. Conflicting Objectives in the Pre-Accession Strategy' (2007) CEPS Working Document No. 259, at 7 <http://shop.ceps.eu/BookDetail.php?item_id=1469> accessed 11 December 2007.

⁷⁶ European Partnerships <http://ec.europa.eu/enlargement/key_documents/reports_nov_2007_en.htm> accessed 11 December 2007.

⁷⁷ Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilisation and association process, OJ L 86/1, 24.3. 2004.

⁷⁸ Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Albania and repealing Decision 2004/519/EC, OJ L 35/1, 7.2.2006.

Moreover, since 2002, the Commission has been assessing the performance of these countries in annual progress reports.⁷⁹ Similar to the Regular Reports, each of the progress reports contains a section evaluating anti-corruption policy. In its first progress report on the situation in the Western Balkan countries, the Commission noted that:

Corruption is a severe problem throughout the region and a basic feature of the political landscape. Its sheer scale and links with organised crime undermine basic public confidence in political and constitutional order in a region where these are already fragile for other reasons. It also deters foreign investment. Efforts are being made to address this in some countries; but these efforts have not yet generated the momentum needed to persuade politicians that this is a serious obstacle to moving closer to the EU.⁸⁰

The fight against organised crime and corruption in the Western Balkans countries is one of the priorities of EU external policy in the area of JHA.⁸¹ In 2006 the Council adopted the Action Plan, which invited the Western Balkan countries to develop and implement national anti-corruption action plans and create independent bodies for the prevention, investigation and prosecution of corruption.⁸² The fight against corruption is also one of the areas of action under the Stability Pact for South Eastern Europe initiated by the EU in 1999.⁸³ As Trauner has put it, the Stability Pact is 'a framework agreement to streamline the existing efforts in the region and to develop a shared strategy among all actors for stability and growth in south-eastern Europe.'⁸⁴

The EU policy towards the countries of the Western Balkans and the prospects it offers are serving as catalyst for reform in the same way the accession process did in the CEE countries. However, the application of the EU pre-accession framework to this

⁷⁹ Progress Reports <http://ec.europa.eu/enlargement/key_documents/reports_nov_2007_en.htm> accessed 11 December 2007.

⁸⁰ Commission (n 74), at 10.

⁸¹ Council of European Union, 'A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice', 15446/05, 6.12.2005.

⁸² Council of the European Union, 'Action Oriented Paper on Improving Cooperation, on Organised Crime, Corruption, Illegal Immigration and Counter-terrorism, between the EU, Western Balkans and relevant ENP countries', 9272/06, 12.5.2006, at 9.

⁸³ For more information on the Stability Pact Anti-Corruption Initiative, see: <<http://www.stabilitypact.org/anticorruption/default.asp>> accessed 11 December 2007.

⁸⁴ Trauner (n 75), at 9.

regional setting suffers from two major shortcomings, namely the EU 'commitment deficit', which generates doubts about the credibility of the EU membership promise, and the uncertain timeframe within which compliance with EU rules will be rewarded.⁸⁵ It has been pointed out that '...without the ultimate prospect of full membership, or even the prospect that this may be significantly delayed or reduced to some form of privileged partnership, there is a danger that internal reforms in the Western Balkans could slow down, stall, or even regress.'⁸⁶ As the *Economist* has observed, the security and stability of the Western Balkans depends on holding out the promise of joining the EU one day.⁸⁷

The political context was different for Bulgaria and Romania, whose accession was seen as a completion of the 2004 enlargement. As has been observed, the EU set a date for their accession for 2007 '...partly to console them over the fact that they were not included in the first wave of enlargement in 2004....'⁸⁸ However, as some authors noted, 'Bulgarian and Romanian accession is seen by some as a lesson in how not to enlarge the EU.'⁸⁹ This may undermine the prospects for accession of the Western Balkans countries and the EU may not be willing to give them sufficient incentives to ensure the continuity of reforms in the region.

2.2. European Neighbourhood Policy

The ENP was developed in 2004 to provide a framework for the development of a relationship with third countries which would not include the prospect of membership. It governs the EU relations with Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia⁹⁰, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria,

⁸⁵ Ibid, at 12.

⁸⁶ Brown and Attenborough (n 54), at 24.

⁸⁷ 'In praise of enlargement' *The Economist* (28 September 2006).

⁸⁸ House of Lords, 'The Further Enlargement of the EU: threat or opportunity?' (2006), 53rd Report of Session 2005-06, at 36.

⁸⁹ Parker, Hope and Condon (n 49).

⁹⁰ The EU also supports the anti-corruption reforms in Georgia within the framework of EU Rule of Law Mission, Eujust Themis on the basis of Council Joint Action 2004/523/CFSP, OJ L 228, 29.6.2004. For the assessment, see: Council of the European Union, 13751/1/04, 10.09.2007.

Tunisia and Ukraine.⁹¹ On one hand, this policy is intended to reassure current Member States that the EU will not continue enlarging indefinitely; on the other, it offers the ENP countries a process of integration that does not prejudge which of them might someday join the EU.⁹²

The EU has modelled the ENP on the enlargement process.⁹³ It is using conditionality to strengthen the ENP countries' commitment to democratic reforms. The EU offers to step up cooperation and to allow progressive integration into certain policies and programmes, depending on the fulfilment of these commitments. The countries that promote more shared values get priority in financial support, as well as greater and speedier access to the internal market.⁹⁴ The participation in the internal market depends on meeting agreed targets for reform.

The use of enlargement templates is especially visible in the Action Plans and progress reports that were drawn up. The Action Plans have been adopted since 2004, and they establish key priorities to be addressed in the years ahead by the ENP countries.⁹⁵ Priorities for action focus on political reforms similar to those aimed at candidate countries. They intend to strengthen the commitment to democracy and the rule of law, including the reform of the judiciary, the fight against corruption and the development of civil society. Unlike during the accession process, however, the EU develops the policy targets in close cooperation with the partner countries themselves. As has been discussed in Chapter Four, the EU defined membership conditions in a unilateral way and they were not subject to negotiations with the candidate countries. Within the ENP policy, however, the EU is not only consulting the countries involved, but also asks international organisations, such as the Organization for Security and

⁹¹ More information available at: <http://ec.europa.eu/world/enp/index_en.htm> accessed 12 November 2007.

⁹² H. Grabbe, 'How the EU should help its neighbours' (2004) CER Policy Brief, at 1 <http://www.cer.org.uk/pdf/policybrief_eu_neighbours.pdf> accessed 11 December 2007.

⁹³ J. Kelley, 'New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy' (2006) *Journal of Common Market Studies*, Vol. 44 No. 1, 29-55.

⁹⁴ *Ibid.*, at 36-37.

⁹⁵ Action Plans <http://ec.europa.eu/world/enp/documents_en.htm#2> accessed 11 December 2007.

Cooperation in Europe (OSCE), the Council of Europe, and the International Labour Organisation for assistance with establishing benchmarks.⁹⁶ As the Commission has admitted, the EU does not seek to impose priorities or conditions on its partners and there is no question of asking partners to accept a pre-determined set of priorities.⁹⁷ The involvement of national governments in setting the reform agenda ensures greater commitment to the reforms and more effective implementation of these priorities.

The Action Plans contain specific sections devoted to the area of anti-corruption and list many specific recommendations in this area.⁹⁸ The most consistently applied indices include: the alignment of the national law in accordance with the relevant international instruments in this area, development of codes of ethics for public officials, regulation of conflict of interests, implementation of the recommendations of GRECO, effective implementation of the anti-corruption strategy and an increase the public awareness in the area of anti-corruption. The ENP progress reports evaluate annually the progress in implementing the Action Plans in the same way as were the Regular Reports used in the 2004 enlargement⁹⁹. They briefly describe the progress made by each country in the fight against corruption and identify the remaining areas where improvement is necessary.

The EU also provides the ENP countries with technical and financial assistance to support reforms indicated by the Action Plans. The main financial instrument is the European Neighbourhood and Partnership Instrument, which aims at supporting initiatives promoting the rule of law and good governance, including the fight against

⁹⁶ Commission (EC), 'Wider Europe- Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' COM(2003) 104 final, 11.03.2003, at 16.

⁹⁷ Commission (EC), 'European Neighbourhood Policy. Strategy Paper' COM(2004) 373 final, 12.5.2004, at 8.

⁹⁸ For example: EU/Armenia Action Plan, at 13-14

<http://ec.europa.eu/world/enp/pdf/action_plans/armenia_enp_ap_final_en.pdf> accessed 11 December 2007.

⁹⁹ Progress Reports <http://ec.europa.eu/world/enp/documents_en.htm#2> accessed 11 December 2007.

corruption.¹⁰⁰ The EU is also promoting institutional models in the ENP countries through twinning.¹⁰¹

The EU thus has a great political capacity to influence the development of anti-corruption policies far beyond its borders. It remains to be seen, however, whether the ENP will be able to produce similarly positive effects to those achieved within the pre-accession policy. There is a risk that without the incentive of membership, the countries may not be motivated enough to undertake difficult domestic reforms. This in particular applies to anti-corruption reforms, which are often politically sensitive and require long-term commitment on the side of governments. An additional problem is that compared to the EU candidate countries, ‘...the ENP countries are starting out with lower points of democracy, human rights, labour rights and law and order.’¹⁰² As Grabbe has pointed out, to achieve success without offering the prospect of accession, the EU must give ‘specific rewards in return for specific improvements, with clear conditions and benchmarks to measure progress, rather than vague promises of “launching a dialogue” on various issues.’¹⁰³

The consistent inclusion of anti-corruption policy in the EU programme for third countries once again confirms that the EU sees the fight against corruption as an indispensable element of a functioning democratic system. The accession policy has had a great impact on advancing the issue of corruption in the external policy. The next section discusses whether similar developments are taking place in the EU policy towards the Member States.

¹⁰⁰ Article 2(d) of the Regulation (EC) of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument No 1638/2006, OJ L 310/1, 9.11.2006.

¹⁰¹ N. Wichmann, ‘The Intersection between Justice and Home Affairs and the European Neighbourhood Policy: Taking Stock of the Logic, Objectives and Practices’ (2007) CEPS Working Document No. 275, at 10 <http://www.libertysecurity.org/IMG/pdf_1546.pdf> accessed 11 December 2007.

¹⁰² Kelley (n 93), at 44.

¹⁰³ Grabbe (n 92), at 3.

3. The anti-corruption policy after the 2004 enlargement

Without a specific mechanism allowing the EU to discipline post-2004 Member States to continue their anti-corruption reforms, the only option left was to introduce a new framework that would allow for the evaluation of the anti-corruption policies of all Member States. The 2004 enlargement, however, did not bring about any immediate changes in the EU policy against corruption within the Member States. Nevertheless, subsequent policy developments in this area suggest that the EU may be moving towards a much more comprehensive policy.

The importance of the prevention of, and fight against, corruption was underlined in 2004. That year, a five-year programme for EU action in the area of JHA, the so-called Hague Programme was launched.¹⁰⁴ One of the initiatives foreseen by the Hague Programme was the development of a strategic concept on tackling organised crime and an examination of the links between corruption and organised crime.

In 2005, the Commission presented the Communication on developing a strategic concept on tackling organised crime¹⁰⁵, which provided for some important developments in the area of anti-corruption. The Commission recognised that corruption is the key tool by which organised crime infiltrates the legal markets and recommended ‘...further development and implementation of a comprehensive EU anti-corruption policy including criminal law measures, the promotion of ethics and integrity in public administration and improved monitoring of national anti-corruption policies in the context of EU and international obligations and other standards...’¹⁰⁶

¹⁰⁴ Council of the European Union, ‘The Hague Programme: strengthening freedom, security and justice in the European Union’ 16054/04, 13.12.2004.

¹⁰⁵ Commission (EC), ‘Developing a strategic concept on tackling organized crime’ COM(2005) 232 final, 2.6.2005.

¹⁰⁶ Ibid, at 4.

Additionally, in order to improve knowledge of the links between corruption and organised crime, in 2006 the Commission recommended the development of crime statistics, including on corruption, in collaboration with Member States, using the Community Statistical Programme as needed.¹⁰⁷ Development of common statistics on corruption would enable the Commission and the Member States to gain a clearer understanding of the corruption phenomenon. As already discussed in Chapter One, there is no single universally agreed definition of corruption. As a result, the Member States may differ not only in defining corruption, but they might also have a variety of statistical collection procedures to measure the extent of corruption in their countries. Collecting evidence on the scale of corruption is problematic. In its policy towards the candidate countries, the EU often relied on the indexes produced by TI, which do not measure the actual extent of corruption, but only the perception of the problem. In relation to the Member States, the EU must justify every new initiative in the light of the principle of subsidiarity, and it would be difficult to propose new anti-corruption measures at the EU level based exclusively on the perception of the problem. Developing comparable statistical information on the trends and levels of corruption would help to assess whether corruption constitutes a problem across the EU, and reliable evidence may convince the Member States that more coordinated action against corruption is needed.¹⁰⁸

In response to the Hague Programme, the Commission also presented the Action Plan, which listed the main actions and measures to be taken over the years 2005-2009, including specific deadlines for their presentation to the Council and the EP.¹⁰⁹ In the area of anti-corruption, two specific measures are proposed by the Commission: the

¹⁰⁷ Commission (EC), 'Developing a comprehensive and coherent EU strategy to measure crime and criminal justice: An EU Action Plan 2006 – 2010' COM(2006) 437 final, 7.8.2006.

¹⁰⁸ The Commission already sponsored a study in December 2005/April 2006 on five types of crime, including corruption. It was conducted by Transcrime, the Joint Research Centre on Transnational Crime. The aim of the study was to collect data on corruption and highlight similarities and differences in the way the Member States have defined and collected the statistics and propose harmonised definitions and collection procedures, see: <<http://www.transcrime.unitn.it/tc/507.php>> accessed 11 December 2007.

¹⁰⁹ Commission (EC), 'The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice' COM(2005) 184 final, 10.5.2005.

examination of the need for codes of conduct on ethics and integrity for public officials and consideration of whether to introduce obligations on certain categories of officials with regard to reporting bribery as well as disclosure of assets and business interests.¹¹⁰ More importantly, the Commission also plans to evaluate Member States' anti-corruption policies in 2009.¹¹¹ It remains to be seen what the practical impact of the above instruments will be, but they need to be assessed very positively. They all would take EU policy beyond regulation of cross-border corruption and aim at influencing the content of national anti-corruption strategies.

One of the most important initiatives under consideration within the Council is setting-up a network among anti-corruption authorities (including police, judicial, prosecutorial and customs authorities) at EU level with a target date of 2008.¹¹² In 2005 a proposal was made by Austria, Finland, Greece, Hungary, Lithuania, Luxembourg and Slovakia for a Council Decision to establish the European Anti-Corruption Network (EACN).¹¹³ It was proposed that the EACN would be composed of contact points designated by each Member State and OLAF with the main task being to 'contribute to developing the various aspects of the fight against corruption at Union level' and to 'support anti-corruption activities at national level.'¹¹⁴ The EACN would facilitate co-operation, contacts and exchanges of experience among Member States, national organisations, OLAF, the Commission, Council, and other groups of experts and networks specialising in anti-corruption matters.¹¹⁵ It would also enhance international cooperation which may include holding conferences, organising exchange of staff between the relevant organisations in the Member States, developing common training programmes and establishing of minimum standards for codes of ethics.¹¹⁶

¹¹⁰ Ibid, at 22.

¹¹¹ Ibid, at 24.

¹¹² Ibid, at 25.

¹¹³ Council of the European Union, DRAFT 'Council Decision on the setting up of a European Anti-Corruption Network' 15629/05, 14.12.2005 (DRAFT EACN Decision).

¹¹⁴ Article 3(1) of the Draft EACN Decision

¹¹⁵ Articles 2 and 3(2)(a) of the Draft EACN Decision

¹¹⁶ Article 3 (2)(b) of the Draft EACN Decision

The above initiative did not ultimately succeed as some Member States felt it was too formalised.¹¹⁷ Since then, the need for a network of contact points has been expressed repeatedly, in particular by OLAF.¹¹⁸ In 2007 Germany presented an amended proposal for a contact-point network against corruption, which has a much more limited scope and is less ambitious than the proposal for the EACN.¹¹⁹ Although the original proposal clearly stated that the activities of the EACN would not affect the national competences in the area of anti-corruption, as the network would operate on voluntary basis and be subject to national legislation¹²⁰, there was potential for it to play a greater role. The EACN was required to submit a report to the Council on its activities each year, indicate the areas for priority action, and ask the Council to take note of the report and forward it to the EP.¹²¹ Furthermore, it was proposed that the EACN would collect information on anti-corruption activities, evaluate it to determine the best practices and provide expertise to the Council and to the Commission in all matters concerning corruption.¹²² There was therefore a chance that the reports and evaluations of the EACN would act as a catalyst for a change in EU policy. The EACN could report to the Council on any shortcoming in the national policies and lobby for coordinated EU action in this area.

The new proposal from 2007 abandons these potentially far-reaching provisions. Instead, it provides for the creation of a less formal contact-point network against corruption, which would consist of national authorities and agencies charged with preventing and combating corruption. It is proposed that the new network should have two main tasks: it should constitute a forum for the exchange of information on effective measures against corruption, and it should facilitate the establishment of contacts among

¹¹⁷ Council of the European Union, 'Draft Council Decision on a contact-point network against corruption' 6589/3/07, 13.6.2007.

¹¹⁸ Ibid.

¹¹⁹ Council of the European Union, 'Initiative of the Republic of Germany with a view to the adoption of a Council Decision on a contact-point network against corruption' 11202/07, 25.6.2007 (the New Proposal).

¹²⁰ Article 3(2) of the Draft EACN Decision.

¹²¹ Article 3(2)(e) of the Draft EACN Decision.

¹²² Article 3 (2)(d) of the Draft EACN Decision.

its members.¹²³ The changes introduced to the proposal show the reluctance of Member States to reinforce substantially cooperation in this area.

The contact-point network against corruption is not a new concept at the EU level. An informal network already exists in the form of the European Partners Against Corruption (EPAC).¹²⁴ The general objectives of EPAC include the exchange of experiences and best practices among agencies combating corruption in Member States. The new network would build on the existing informal structure of EPAC.¹²⁵ Among the most important benefits of the formalisation of such cooperation is that it would bring increased commitment from Member States towards the network's programme, and thus lead to more efficient fulfilment of policy objectives.

The proposal also provides that the network would operate without prejudice to the European Police College¹²⁶, which already provides training of police in the area of corruption and financial crime. A question arises as to the possible overlap in the work of the new contact-point network with other similar initiatives at the pan-European level. This particularly applies to the Council of Europe's GRECO, the OECD WG and the Working Group on the Review of Implementation of the UNCAC. All these initiatives cover geographical areas that are larger than the EU. A separate network at the EU level needs to avoid overlapping with these initiatives, but it can also deliver an added value, as it would provide a more accurate and comparable EU-wide view of the situation. The anti-corruption network would be in better position to reflect the political priorities of the EU.

¹²³ Article 3 of the New Proposal.

¹²⁴ For more, see: <<http://www.epac.at>> accessed 11 December 2007. The exchange of knowledge and best practice is also taking place within the European Healthcare Fraud and Corruption Network (EHFCN), which includes some of the Member States, regions and candidate countries; see: <<http://www.ehfcn.org/index.asp>> accessed 11 December 2007.

¹²⁵ The original proposal for the EACN was based on the recommendation of the 4th EPAC-Conference in 2004, see <http://www.epac.at/download/vienna_declaration.pdf> accessed 11 December 2007.

¹²⁶ For more information see: <<http://www.cepol.europa.eu/>> accessed 11 December 2007.

If the current proposal is accepted by the Council, it will mean that the Member States chose a less ambitious option, as the network's role will be restricted to the collection of information as well as the monitoring and comparison of developments in the area of anti-corruption. The network will not be well placed to contribute to the developments of EU policy. In contrast, the original proposal implied a more permanent structure and offered a better chance for the network's view to be taken into consideration by the EU.

Nonetheless, this initiative, however limited, is a very positive development. It would contribute to the exchange of best practices and information on the ways in which Member States respond to corruption, and it would also support the efforts of domestic officials vis-à-vis their own governments. The network may also be a pilot project for more enhanced cooperation in this area. A comparison can be drawn to other policy areas, such as migration, where cooperation among the Member States started in 2002 through an informal contact-points network and in 2007 the Commission proposed the creation of a more ambitious European Migration Network.¹²⁷

4. Possible developments

Survey evidence in 2007 (See: Table 7.1) showed that corruption remains an ongoing challenge within the EU. It is seen to be a problem in most of the new Member States, but is generally no worse than in some longer established Member States, in particular Greece, Italy and Portugal¹²⁸. Moreover, corruption is perceived to be widespread in the three candidate countries: Turkey, Croatia and Macedonia.

¹²⁷ Commission (EC), 'Proposal for a Council Decision Establishing a European Migration Network, Ex Ante Evaluation of the Feasibility of a European Migration Network' COM(2007) 466 final, 10.8.2007.

¹²⁸ It is worthy of note that in 2007 Transparency International emphasised the 'significant improvement' made by the Czech Republic, Italy and Romania which were ranked at 46, 45 and 84 respectively in Transparency International CPI 2006, see: Transparency International CPI 2007 Regional Highlights <www.transparency.org> accessed 11 December 2007.

Table 7.1: Member States and candidate countries in the Transparency International CPI 2007

Country Rank	Country	TI Score
1	Denmark	9.4
1	Finland	9.4
4	Sweden	9.3
7	Netherlands	9.0
12	Luxembourg United Kingdom	8.4
15	Austria	8.1
16	Germany	7.8
17	Ireland	7.5
19	France	7.3
21	Belgium	7.1
25	Spain	6.7
27	Slovenia	6.6
28	Estonia Portugal	6.5
33	Malta	5.8
39	Cyprus Hungary	5.3
41	Czech Republic Italy	5.2
49	Slovakia	4.9
51	Latvia Lithuania	4.8
56	Greece	4.6
61	Poland	4.2
64	Bulgaria Croatia Turkey	4.1
69	Romania	3.7
84	Macedonia	3.3

Source: TI survey of 179 countries

<http://www.transparency.org/policy_research/surveys_indices/cpi/2007> last accessed 8 November 2007

As a result of accession, the EU lost its leverage over the national anti-corruption policies of new Member States. As has been pointed out, ‘it’s a cruel irony that the EU has maximum leverage in questions of corruption performance before accession, but

once countries are in the Union, where money, goods, people – and problems - can move freely, the influence drops to almost zero. This has to change.’¹²⁹

As observed in Chapter Three, the EU does not have a framework to discipline the Member States with regard to corruption. The monitoring of democracy and the rule of law among the Member States is prescribed by Article 7 EU Treaty, which provides a legal basis for sanctioning Member States that are found to be in breach of the rule of law. On the basis of this Article, in the case of a serious and persistent breach of the rule of law, the Council may decide to suspend certain rights of a Member State, including voting rights in the Council. The procedure, however, is not likely to be used even in cases of widespread corruption occurring within the political or economic system of a Member State. Sanctioning a Member State is a highly politicised process. As indicated in Table 7.1, many Member States are perceived to face similar corruption problems, and it would be politically implausible to single out and sanction only one of them.

Although the problems of corruption are not confined to the new Member States, it is particularly important to maintain high anti-corruption standards in these countries after their accession. Central and Eastern Europe have been through a successful democratic transition, but the consolidation of democracy has not yet been fully achieved and will take a few more decades. The fight against corruption constitutes a crucial element of this process. If the irreversibility of anti-corruption reforms is not ensured, there is a danger of seriously undermining the quality of democratic changes in these countries. Successful anti-corruption reforms require years of commitment and monitoring. Lack of an anti-corruption strategy within the EU endangers the success of anti-corruption reforms promoted by the EU during the enlargement.

EU initiatives, such as the development of a post-accession evaluation mechanism for Romania and Bulgaria, the insertion of the safeguard clauses into the

¹²⁹ Transparency International, Press Release, (27 June 2007)

<http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_06_27_bulgaria_romania_accession_eu> accessed 11 December 2007.

Treaty of Accession and the provision of financial support for anti-corruption efforts after accession, suggest that the EU was aware that problems of corruption would persist and did not consider its role in this area as finished. Combating corruption must be an ongoing priority. The levels of corruption in some Member States may constitute an obstacle to the effective implementation of the *acquis*. The high-level corruption carries the risks that police information shared among the authorities of Member States may be communicated to organised groups. Also, corruption is likely to endanger the proper use of EU funds. In fact, if appropriate preventive measures are not taken, the EU financial assistance could reinforce corruption and deprive societies of the benefits of accession. Corruption in the public procurement process has the potential to undermine fair competition within the internal market.

The current EU policy framework cannot meet the above challenges. There are basically two ways in which the EU can address the current problems. It can either cooperate more closely with the Council of Europe or develop its own framework that would allow supervision of the Member States' anti-corruption strategies. The following sections explore these two alternatives.

4.1. Arguments for a closer cooperation with the Council of Europe

Closer cooperation with the Council of Europe in the area of anti-corruption should be considered in the broader context of networking between the EU and the Council of Europe. One of the most important examples of such networking is the issue of the Community's accession to the European Convention of Human Rights (ECHR).¹³⁰ In the event of accession, the European Court of Human Rights would carry out judicial control regarding the respect for fundamental rights by the EU institutions, taking precedence over the ECJ in this area.¹³¹

¹³⁰ Council of Europe, 'Convention for the Protection of Human Rights and Fundamental Freedoms' ETS No. 005 (adopted 1 November 1950, entered into force 3 September 1953).

¹³¹ In the Opinion 2/94 [1996] ECR I-1759, the ECJ concluded that under the current Treaties, the Community had no competence to accede to the ECHR. An explicit authorization enabling the Union to

Similar to its role in the area of human rights, the Council of Europe has developed the most comprehensive anti-corruption framework at the pan-European level. Therefore, instead of developing a separate framework in this area, the EU could cooperate more closely with the Council of Europe and its monitoring mechanism GRECO. That would also be in line with the premise of the EU policy against corruption, which is to build upon other international initiatives and avoid unnecessary duplication. Relying on the Council of Europe's mechanism may also be the only viable option if there is no political will to set up a separate anti-corruption framework at the EU level.

As discussed in Chapter One, GRECO evaluates its member countries' compliance with the Council of Europe anti-corruption instruments, including the Twenty Guiding Principles for the fight against corruption. It is the most comprehensive monitoring mechanism in Europe, and as of 30 November 2007 providing evaluations for 46 member countries. Accession to GRECO was one of the conditions of EU membership, and all the Member States are parties to it. GRECO operates on an intergovernmental basis, and closer cooperation between the EU and GRECO could possibly increase the influence of the GRECO monitoring mechanism across the Member States. A closer cooperation with the EU would allow for identifying problems common to all Member States and this in turn may encourage Member States to address these problems at the EU level.

One of the options considered at the EU level is the accession of the Community to the Council of Europe anti-corruption conventions and GRECO, which was proposed by the Commission in 2003.¹³² The statute of GRECO provides for the possibility of

accede to the ECHR is introduced in the Article 6 (2) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, (2007) CIG 14/07
<<http://consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf>> accessed 11 December 2007.

¹³² Commission (n 71), at 9.

Community participation in its work.¹³³ Also, the Council of Europe's Civil Law Convention¹³⁴ in Article 18 and Criminal Law Convention¹³⁵ in Article 33 provide for specific accession clauses for the Community. Membership in GRECO follows automatically from accession to both conventions.¹³⁶ Under the current Treaties, only the Community has a competence to become a party to the Council of Europe instruments.¹³⁷ However, it is important to note that the Treaty of Lisbon changes this situation, as the Union as a whole is given a single legal personality to take on international obligations.¹³⁸

The terms and modalities of the Community's membership in GRECO are not prescribed in advance and are subject to negotiations between the EU and the Council of Europe.¹³⁹ One may, however, speculate about the political and legal implications of an eventual accession to GRECO. The central question is whether the Community's accession to GRECO would reinforce the monitoring of Member States' anti-corruption policies. Considering the very limited competence of the Community in the area of anti-corruption, as discussed in Chapter Two, such a development is unlikely. A comparison can be drawn to the participation of the Commission in FATF, which, as observed in Chapter One, monitors members' progress in implementing anti-money laundering measures. As a result of this participation, as explained in Chapter Three, the Community has brought anti-money laundering Directives in line with the latest FATF standards. However, in the area of anti-corruption, the Community has much more

¹³³ Article 5 of the Statute of GRECO, Council of Europe, Appendix to Resolution (99) 6 <http://www.coe.int/t/dg1/greco/documents/statute_en.asp> accessed 10 December 2007.

¹³⁴ Council of Europe, Civil Law Convention on Corruption, ETS No.: 174 (adopted 4 November 1999, entered into force 1 November 2003) (the Civil Law Convention) <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=174&CM=1&DF=7/11/2007&CL=ENG>> accessed 6 December 2007.

¹³⁵ Council of Europe, Criminal Law Convention on Corruption, ETS No.: 173 (adopted 27 January 1999, entered into force 1 July 2002) (the Criminal Law Convention) <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=173&CM=1&DF=7/11/2007&CL=ENG>> accessed 9 December 2007.

¹³⁶ Article 32 of the Criminal Law Convention on Corruption and Article 15 of the Civil Law Convention.

¹³⁷ Article 281 EC Treaty.

¹³⁸ Article 46A of the Treaty of Lisbon.

¹³⁹ Article 5 of the Statute of GRECO.

limited competence. Therefore, the reinforcement of GRECO evaluations with the use of Community sanctions under the current Treaties is not legally feasible.

The Community can accede to the Council of Europe Conventions and GRECO only within the limits of its competence. The external competence of the Community is limited by the principle of attributed powers (Article 5 EC) and by the competence which it may exercise in accordance with the objectives set by the EC Treaty.¹⁴⁰ The Commission outlined the Community's competences in the area of anti-corruption in 2006 on the occasion of accession to UNCAC.¹⁴¹ On that basis it is possible to assess to what extent the Community would be able to apply the provisions of the Council of Europe instruments.

As in the case of accession to UNCAC, the Community could apply the relevant provisions of the Council of Europe instruments to its own administration. For example, as far as Twenty Guiding Principles are concerned, Principle No 7 relates to the specialisation of bodies in charge of fighting corruption and providing them with appropriate means and training to perform their tasks. If the Community were to become a member of GRECO, its anti-corruption body OLAF should become subject to an evaluation process. In addition, the Twenty Guiding Principles contain recommendations on public procurement and audit which could be applied to the Community.

Apart from the above, the majority of areas covered by the Council of Europe's instruments fall under the competence of the Union¹⁴² or the Member States.¹⁴³ In

¹⁴⁰ I. Govaere, J. Capiu and A. Vermeersch, 'In-Between Seats: The Participation of the European Union in International Organizations' (2004) *European Foreign Affairs Review* 9: 155-187, at 158.

¹⁴¹ Commission (EC), 'Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the United Nations Convention Against Corruption' COM(2006) 82 final, 2.3.2006, Annex II.

¹⁴² For example: Principle 2 on criminalisation of international corruption or Principle 4, which requires adoption of measures for the seizure and deprivation of the proceeds of corruption offences. These matters are regulated by the third pillar instruments, as already discussed in Chapter Three. In addition provisions of the Criminal Law Convention including criminalisation of bribery and laundering of proceeds from corruption, corporate liability and international cooperation are also addressed under the third pillar instruments.

recognition of that, the Community's accession to the Council of Europe Conventions and resulting membership in GRECO has not been further pursued by the Commission, and it was recognised that the necessary legal basis does not exist to support such an application at this point.¹⁴⁴

Given the very limited competence of the Community, one can conclude that accession to the Council of Europe instruments would not result in a significant change in the EU policy towards Member States. Such accession should, however, be strongly advocated for other reasons. It would certainly enhance the legitimacy of the EU framework against corruption within its institutions. The quality of the Community's staff regulations, codes of conduct, public procurement and audit regulations would be subject to the detailed and impartial control of GRECO. It would also send an important signal to the Member States and possibly increase their cooperation with GRECO. Furthermore, a long term benefit could come from the Community's participation in the future development of the Twenty Guiding Principles.

Cooperation with GRECO should be reconsidered by the Commission if the Treaty of Lisbon is ratified and the Union is given a single legal personality. The accession of the Union to GRECO would bring more significant results. This potential gain derives from the fact that, as already discussed in Chapter Two, the Union has much broader competence in this area.

4.2. The case for a separate EU anti-corruption framework

Given the extensive activity of the Council of Europe, why should the EU develop a separate anti-corruption framework at all? In the area of JHA, the Council of Europe has

¹⁴³ The good example of that is Principle 6 on limiting immunity from investigation and prosecution of corruption or Principle 15 on regulation of political party financing.

¹⁴⁴ Statement by Lucinda Mac Mahon, European Commission Directorate-General Justice, Freedom and Security (Personal email correspondence 5 September 2007).

been an important 'laboratory of cooperation'.¹⁴⁵ As already noted in Chapter Three, the EU often built upon the instruments of the Council of Europe and made them more binding among Member States. As Monar has observed, the Member States often realised that '...some of the interests they had in common could not be adequately pursued within the larger framework of the Council of Europe with its great diversity of interests and heavy and lengthy negotiation procedures', and therefore, they moved beyond these limitations by setting up their own framework of cooperation.¹⁴⁶

The EU could therefore use the experience of GRECO as a point of departure for its own anti-corruption framework. The main advantage of a separate framework is the fact that, due to a degree of integration among Member States within the EU, it could have a more binding nature. Moreover, since 1997 the EU has been gradually gaining experience in the evaluation of national anti-corruption policies in the candidate countries, and this experience has contributed to the emergence of new EU standards in this area.

The accession of the candidate countries to GRECO was not considered enough to guarantee progress in combating corruption, and the EU decided to develop its own policy to monitor progress in this area. The intergovernmental mechanisms of the Council of Europe were not sufficient to address the needs of accession policy in this area, and this was particularly evident in the cases of Bulgaria and Romania. Despite the fact that both countries joined GRECO in 1999, the EU has remained concerned about their problems with corruption. As has been observed, by defining the list of benchmarks, the Commission signalled '...the need of a much more sophisticated tool for evaluating governance reform and progress ...'¹⁴⁷

¹⁴⁵ For more, see: J. Monar, 'The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs' (2001) *Journal of Common Market Studies*, Vol. 39 No. 4, 747-764, at 748-750.

¹⁴⁶ *Ibid*, at 750.

¹⁴⁷ Center for the Study of Democracy, 'The Future of Corruption Benchmarking in the EU' (2007) Brief No 11, at 2 <<http://www.csd.bg/fileSrc.php?id=2117>> accessed 12 December 2007.

The possible anti-corruption framework could essentially be developed in two ways, by using either a hard or a soft law approach. A 'hard law' option is to elaborate an EU system for the fight against corruption that would contain a catalogue of the anti-corruption benchmarks combined with an effective mechanism for its enforcement. Chapter Two concluded that the EU has the legal capacity to develop a more comprehensive anti-corruption framework under the third pillar, but progress in this area depends on the political will of Member States. The development of a binding framework is likely to meet strong Member State's resistance, as it would involve EU interference in many areas of public policy within Member States, such as the functioning of their public administration, the assessment of the independence of their judicial systems and the freedom of media.

The second option, which has more chances to succeed, is to develop a soft anti-corruption *acquis* based on benchmarking and the sharing of best practice. The term 'soft law' refers to rules that are not binding and there are no sanctions to enforce compliance.¹⁴⁸ One of the main advantages of this option is that Member States may be more willing to agree on higher standards if they know that non-compliance will not be sanctioned.

The EU has a suitable mechanism developed in other policy areas that could be successfully applied in the area of anti-corruption. The new anti-corruption framework could be based on the OMC initiated by the Lisbon European Council in 2000.¹⁴⁹ The OMC was first applied in the area of employment and gradually extended to other

¹⁴⁸ A. Schäfer, 'Resolving Deadlock: Why International Organisations Introduce Soft Law' (2006) *European Law Journal*, Vol. 12, No. 2, 194-208, at 195.

¹⁴⁹ Lisbon European Council, Presidency Conclusions (23 and 24 March 2000), para 37.

policies, such as social protection, social inclusion, education, youth and training¹⁵⁰. It has been adapted to the specific needs of each of these policies, but it generally involves:

- agreeing guidelines for the Union
- establishing indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice
- translating guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences (preparing National Action Plans)
- periodic monitoring, evaluation and peer review organised as mutual learning processes.¹⁵¹

The OMC is designed to help Member States progressively to develop their own policies towards certain common objectives. Most importantly, the OMC allows for cooperation without interfering with the national autonomy of Member States. It draws on benchmarking, mutual learning, the exchange of best practice and peer pressure to attain its objectives. For the area of anti-corruption, it is of great importance that in drawing up their national policies, Member States are asked to ensure active involvement of NGOs.¹⁵² As Caviedes has observed, being forced to compare and evaluate national policies in an open forum with the participation of the civil society and international actors ‘...involves a risk of losing control over the agenda-setting process.’¹⁵³ This may

¹⁵⁰ Europa Glossary <http://europa.eu/scadplus/glossary/open_method_coordination_en.htm> accessed 12 December 2007.

¹⁵¹ Lisbon European Council (n 149).

¹⁵² Commission (EC), ‘Communication from the Commission to the Council and the European Parliament on the open method of coordination for the Community immigration policy’ COM(2001) 387 final, 11.7.2001, at 14.

¹⁵³ A. Caviedes, ‘The open method of co-ordination in immigration policy: a tool for prying open Fortress Europe?’ (2004) *Journal of European Public Policy* Vol. 11 No. 2, 289-310, at 306.

broaden the scope and increase the quality of anti-corruption reforms undertaken by individual countries.¹⁵⁴

In the area of anti-corruption, there is no need for a significant degree of approximation of laws. The action rather requires compliance with a set of policy principles that should be monitored in the Member States. Only certain areas are suitable for legislative approximation. It particularly applies to the penalisation of various types of corruption and the laundering of the proceeds of corruption, the liability of legal persons or transparent public procurement procedures. As discussed in Chapter Three, these areas are regulated by the EU legislator and the necessary minimum level of approximation has already been achieved.

However, each national anti-corruption strategy, however, including preventive policies, must be tailored to the specific need of a country. As already noted in Chapter Five, the causes of corruption are country specific. It would not therefore be possible to devise an optimal anti-corruption policy for a group of countries. Solutions that may work in one country may not be beneficial in others. Although Member States face similar challenges with respect to corruption, the optimal course of action is at the national level. Devising an anti-corruption policy at the international level is rather about setting a number of policy goals that all countries should comply with.

The OMC allows for policy formation best suited to national needs.¹⁵⁵ The goals are set at the EU level, but the responses are formulated at the national level. Member States can learn about solutions found in other Member States and may apply them in

¹⁵⁴ This is in line with Duina and Raunio who note that the experience to date shows that national legislators used the OMC to develop more successful domestic laws and argue that ‘... the OMC generates insights and guidance into legislative best practices which can, in principle at least, be leveraged by national legislators to produce more successful domestic legislation’, see: F. Duina and T. Raunio, ‘The open method of co-ordination and national parliaments: further marginalization or new opportunities?’ (2007) *Journal of European Public Policy* Vol. 14 No. 4, 485-506, at 494 and 499-501.

¹⁵⁵ D. Hodson and I. Maher, ‘The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination’ (2001) *Journal of Common Market Studies*, Vol. 39 No. 4, 719-746, at 741.

their own countries. As has been observed, the OMC could make it easier for Member States to accept common targets ‘...as those would be combined with a longer time horizon and a certain margin of national flexibility for the implementation of these targets...’¹⁵⁶

The demands of European integration require coordination in the area of anti-corruption, but the EU competence in this field is weak. In the case of the OMC, the existence of an explicit legal basis for EU action is not required, as each decision to apply the OMC is taken on ‘a case-by-case basis by the Council acting on a proposal from the Commission or on its own initiative.’¹⁵⁷ At the EU level, there is a need for a framework that could influence the domestic policies and harness national authorities to fight corruption. It is not about creating an EU anti-corruption model, but rather making sure that Member States are part of a framework that ensures the continuity and irreversibility of their anti-corruption efforts. All these factors make the model of the OMC suitable for the needs of anti-corruption policy.

The first application of the OMC in the area of anti-corruption took place within the accession process. As Tulmets has pointed out, the methods used for the preparation, implementation and evaluation of twinning projects relied mainly on the OMC, in particular given the fact that projects needed to indicate benchmarks to be achieved.¹⁵⁸ As observed by Chapter Six, there were numerous twinning projects in the area of anti-corruption through which the EU tried to compensate for the poor *acquis* in this area.

It should also be noted that the OMC has been used to achieve progress in politically sensitive areas in the context of JHA. The Commission advocated using the

¹⁵⁶ J. Monar, ‘Maintaining the Justice and Home Affairs Acquis in an Enlarge Europe’ in J. Apap (ed), *Justice and Home Affairs in the EU: Liberty Security Issues after Enlargement* (Edward Elgar Publishing, 2004), 37-54, at 46.

¹⁵⁷ European Parliament, ‘Analysis of the open coordination procedure in employment and social affairs’ P5_TA(2003)0267, 5.6.2003.

¹⁵⁸ E. Tulmets, ‘The Introduction of the Open Method of Coordination in the European Enlargement Policy: Analysing the Impact of the New PHARE/Twinning Instrument’ (2005) *European Political Economy Review*, Vol.3 No.1, 54-90, at 63.

OMC for immigration and asylum policy, proposing the adoption of guidelines to be implemented through national action plans and monitored by the Commission, which would also make new legislative proposals wherever needed.¹⁵⁹ In the area of immigration, the OMC is meant to support and complement EC legislation.¹⁶⁰

The intergovernmental nature of the OMC, however, carries some risks. The guidelines are open to different interpretations, non-compliance is not subject to any legal sanction, and 'peer pressure' may not ensure respect for deadlines.¹⁶¹ However, as Pieth has argued, '..."soft law" is not a "soft option"', and the impact of politically binding recommendations should not be underestimated.¹⁶² At the international level, monitoring procedures and the risk of public exposure by peers have proved to be highly effective in the area of money laundering.¹⁶³ As observed in Chapter One, in the area of anti-corruption, the OECD WG and GRECO peer pressure mechanisms have also proved to bring results.

Moreover, the OMC could 'serve to reconfigure the boundaries of competence between the Member States and the Union.'¹⁶⁴ As Schäfer has observed, in the longer term, 'soft law' may turn into 'a more solid form of cooperation and foster its own unanticipated dynamic, but during negotiations its main virtue is to avoid deadlock.'¹⁶⁵ An anti-corruption framework based on the OMC can help to identify common problems and this in turn may lead to recognition that a European response is necessary. The

¹⁵⁹ Commission (n 152) and Commission (EC), 'Communication from the Commission to the Council and the European Parliament on the common asylum policy, introducing an open coordination method' COM(2001) 710 final, 28.11.2001.

¹⁶⁰ Caviedes (n 153), at 299.

¹⁶¹ J. Monar, 'Justice and Home Affairs after the 2004 enlargement' (2003) *The International Spectator* 1/2003, 1-18, at 10

¹⁶² M. Pieth, 'The Harmonization of Law Against Economic Crime' (1999) *European Journal of Law Reform*, Vol. 1 No. 4, 527-545, at 536.

¹⁶³ *Ibid.*

¹⁶⁴ Hodson and Maher (n 155), at 722-723.

¹⁶⁵ Schäfer (n 148), at 198.

resulting EU measure could then be based on best practices rather than on a compromise.¹⁶⁶

Conclusion

The policy towards candidate countries should act as a laboratory for the further development of EU policy towards Member States. The current EU anti-corruption framework does not secure the achievements made by the CEE countries, and the reforms in this area take a long time to deliver results. Consequently, there is a need for constant pressure on new Member States to continue with domestic reforms.

This need was expressly recognised by the EU in its policy towards Romania and Bulgaria. However, the verification mechanism designed to safeguard reforms in both countries after the accession is only temporary and its application raises serious political problems. Instead of taking a decision to single out Romania and Bulgaria, the EU should have developed a framework which could have been equally applied to all Member States.

The 2004 enlargement acted as a catalyst for change only to a limited extent. More radical changes occurred in the external policy of the EU. The experience gained by the EU in dealing with the problem of corruption in the CEE countries was utilised and reinforced in the accession of Bulgaria and Romania. The Commission has also decided to change its enlargement strategy for candidate countries and set precise anti-corruption benchmarks at an earlier stage of the accession process. Another important impact of the experience gained in the 2004 enlargement is the inclusion of prevention and combating corruption into the policy towards the Western Balkans and within the ENP. As a result, the EU is applying enlargement instruments to promote anti-corruption reforms in the third countries.

¹⁶⁶ Monar (n 161), at 14.

The 2004 enlargement did not have any immediate impact on EU policy against corruption within existing Member States. Nonetheless, the subsequent policy developments suggest that this EU policy may change. This in particular applies to developing common statistics on corruption, the planned evaluation of national anti-corruption policies in the context of organised crime, and the setting up of an anti-corruption network. These initiatives may contribute to exposing the scale of corruption, which in turn could prompt the Member States to delegate more powers in this area to the EU. The initiatives of Member States are often reactive to the political situation, and if corruption is found to endanger the effective implementation of the *acquis*, then the Member States may be willing to give the EU powers to define standards and evaluate their anti-corruption efforts.

The last two enlargements, however, have profoundly transformed the EU. The accession of the CEE countries gave the EU the opportunity to define the values on which its membership is based. Within the pre-accession process, the EU emphasised that it was ‘...more than an economic partnership of convenience, but a true community of values shared across Europe...’¹⁶⁷ Now there is a need to uphold these values inside the EU as well. The EU should not only promote democracy outside its borders, but it should also foster democracy within its Member States. In the EU external policy, combating corruption has been consistently recognised as an important element of the EU model of democracy. However, the EU has not yet developed a coherent policy to address the problem of corruption within its Member States.

As an important international policy player, the EU should use its political capacity and institutional framework to promote uniformly high anti-corruption standards across its Member States. It is proposed that the EU should develop a soft anti-corruption *acquis*, composed of non-binding guidelines and indicators. The effectiveness of such an anti-corruption framework would rely on a form of peer pressure as well as

¹⁶⁷ Open Society Institute, ‘Judicial Independence in the EU Accession Process’ (2001), at 26
<http://www.eumap.org/topics/judicial/reports/judicial01/sections/overview/judicial_accession.pdf>
accessed 12 December 2007.

naming and shaming, as no Member State wants to be seen as the worst in this policy area. Sound anti-corruption reforms would enhance the credibility of the European integration project and would send the right message to external countries where the EU seeks to promote democracy and the rule of law.

Conclusion

The EU successfully supported and reinforced political and economic reforms in the accession states in Central and Eastern Europe. The incentive of membership benefits combined with strong conditionality gave the EU the necessary leverage to promote anti-corruption reforms in candidate countries. The post-communist countries had to meet vast anti-corruption requirements and were subject to an intrusive evaluation mechanism. Significant improvements were made, but it was far from a complete process. Corruption is an ongoing challenge and combating it requires a long term and consistent commitment. The EU has been able to use the accession process to commit the CEE countries' national governments to anti-corruption reforms, but this ability ceased to exist on the day of accession. If the irreversibility of anti-corruption reforms is not ensured, there is a danger that the quality of democratic changes in these countries could be seriously undermined.

The need for a more coherent anti-corruption policy became particularly urgent with the accession of Romania and Bulgaria in 2007. The recourse to a post-accession verification mechanism only demonstrated that the EU was unable to respond to the problem of corruption within the countries once they gained a Member State status. It also showed that the EU recognises that current pre-accession policy is not robust enough to cure problems with corruption in the candidate countries.

As a result of the 2004 enlargement, corruption became one of the priorities in EU external policy. The EU reinforced its anti-corruption strategy towards the candidate and potential candidate countries. While improvements in the external policy need to be assessed positively, they do not change the fact that the EU must also address the problem of corruption within existing Member States, as the disparity between the standards imposed on candidate countries and those inside the EU is substantial.

The continuing problem of corruption in the new Member States and the lack of an effective mechanism to address it may undermine the commitment of the EU to future enlargements. It comes at a time when the countries of the Western Balkans need reassurance that they have a clear prospect of EU membership. As in the case of the CEE countries, such a prospect is the strongest incentive to promote reform in the Western Balkans. A coherent framework against corruption within the Member States is, therefore, indispensable if the EU wants to continue to promote democracy and stability in its external policy.

This thesis has demonstrated that the EU has not developed a coherent policy against corruption across the Member States and therefore is not able to safeguard the achievements made by the candidate countries during the accession process. The limited response of the EU to the problem of corruption can be explained by the lack of a broader competence in this area. While it is important to emphasise that the EU took initiatives in the areas where the competence is clear, such as cross-border corruption, more needs to be done.

The EU has the necessary tools that could be used to instigate Member States towards developing common anti-corruption standards. However, any progress in this area depends on the political will of the Member States. This is best illustrated in the context of the proposal to establish an anti-corruption network. Discussion on the role of this network and the subsequent amendments to the proposal show the reluctance of Member States to establish more ambitious cooperation in this area.

Up until now, the EU has not addressed corruption as a general threat to democracy and the rule of law across the Member States. Instead, corruption has been targeted by the EU legislation only as an unwanted side-effect in the creation of the internal market. Although the EU was the first organisation at the pan-European level to criminalise cross-border bribery, address corruption in the private sector and introduce the liability of legal persons, its initiatives remain narrow and now lag behind international developments in this area. It can be said that the EU initiatives stopped 'half way through' in comparison with evolving international standards.

While the Council of Europe, the OECD and the UN instruments increasingly embrace efforts to prevent corruption, EU action remains focused on the repression of the offence of bribery. In addition, other international organisations increasingly recognise the fundamental importance of ensuring appropriate monitoring mechanisms for the success of any anti-corruption initiative. Meanwhile, the EU monitoring framework remains ineffective and highly fragmented.

The internal market is based on the mutual confidence that the administrative and judicial systems across the Member States fully respect the rule of law. Moreover, unprecedented integration in the area of judicial cooperation in criminal matters has been increasingly based on mutual recognition and the Member States' trust in each others systems. The new measures rest on the assumption that respect for the rule of law exists uniformly throughout all Member States. In practice, however, some new and old Member States score poorly in the international anti-corruption rankings. If the EU stands for democracy and the rule of law, it should develop its own framework to ensure uniformly high anti-corruption standards throughout the Member States. Corruption undermines the rule of law and corrodes trust. It is therefore of fundamental importance that all the Member States have in place an effective system to fight corruption. For all these reasons, the EU should not leave the regulation of corruption only to intergovernmental cooperation at the international level.

Although the Member States agree on much more far reaching anti-corruption instruments at the international level, they have been unwilling to create a more ambitious system at the EU level. Other international instruments are much more comprehensive but have a less binding nature. Meanwhile, the EU has been unable to develop more robust instruments due to the constant struggle between the Member States and the Community institutions over the division of powers. This struggle is not confined to the area of anti-corruption, but also taking place in other internal market matters. In the third pillar, this struggle is particularly visible because cooperation is needed in very sensitive areas that traditionally fell within the realm of national competence. Gradually, as a result of the Court of Justice case law, EU powers are progressing independently from the will of the Member States. As a result, the Member States prefer to leave the regulation of such sensitive policy matters as anti-corruption to intergovernmental organisations.

At the same time, however, it is the unique and highly advanced integration system of the EU that could bring the most effective results in the fight against corruption across the Member States. EU action in this area does not have to involve any transfer of sovereign powers from the Member States. In the area of anti-corruption, there is a special need for mutual learning and exchange of best practices across countries. The Member States should use the procedures and institutions developed within the EU to agree on higher common anti-corruption standards. Such a framework would not rely on legal sanctions, but rather on persuasion to comply with these standards.

The argument for a separate EU framework is not, however, based on the claim that other monitoring mechanisms at the pan-European level are not effective. Quite to the contrary, the EU system would build on these initiatives and not undermine them. It should be developed in close cooperation with other monitoring mechanisms. There is a need to avoid unnecessary duplication of efforts, especially considering that all these

mechanisms have limited resources and different priorities. The EU mechanism could focus on the implementation of the relevant EU instruments. In addition, the limited membership would be an advantage, as it would allow for identifying and addressing problems common to the Member States.

There is also no need for reinventing a new system. The EU could draw on existing monitoring mechanisms, such as the ones developed by GRECO, the OECD or FATF. The EU also could use the experience it gained within its own mutual evaluation system in the area of organised crime. One important lesson from the 2004 enlargement is that in order to increase the effectiveness of evaluations and dissemination of best practice in this area, the review process must be transparent and present opportunities for participation by civil society. A process whereby governments are assessing governments behind closed doors is not appropriate in the area of anti-corruption.

An improved EU framework alone would not guarantee success in the fight against corruption. Every international initiative in this area must be accompanied by political will coming from within countries. Efforts to fight corruption require strong local leadership and ownership. The EU would help to create additional incentives and provide a forum for the exchange of best practices among Member States.

The question of whether the EU should address corruption within the Member States is in reality part of a more fundamental question about the objectives and the role of the EU. Is its aim primarily economic integration or a union of values? The European Community had economic origins but has been gradually embracing other fields of policy. Since the adoption of the Single European Act in 1986, the creation of the single market has been recognised as the principal objective of integration. The goal of EU policy in the area of justice and home affairs was subordinated to this goal and served to compensate for the abolition of internal border controls. A good example of this is the EU policy against corruption, where the EU focused on regulating cross-border

corruption because of an obvious need for EU action as a consequence of the open border between Member States.

The EU moved beyond the single market agenda in its policy towards the CEE candidate countries, where it focused more than ever on the promotion of democracy and the rule of law. The question is whether the EU should do the same in its policy towards all Member States. The answer must be yes. This thesis has demonstrated that the EU has the capacity and 'know-how' to develop common anti-corruption standards. The question remains whether there is a political will to take action.

List of interviews and consultations

The title or affiliation listed is accurate at the time of the interview

Interviews

Peter Jozsef Csonka, Head of Unit, Directorate-General Justice, Freedom and Security, European Commission (Brussels, 2 December 2005)

Jacek Garstka, Permanent Representation of the Republic of Poland to the European Union in Brussels (Brussels, 1 December 2005)

Grażyna Kopińska, Stefan Batory Foundation, Anti-Corruption Programme, Poland (Warsaw, 16 May 2005)

Lucinda Mac Mahon, Directorate-General Justice, Freedom and Security, European Commission (Brussels, 29 November 2005)

Julia Pitera, Transparency International Poland (Warsaw, 17 May 2005)

Mieneke de Ruiter, General Secretariat DG H 2 B - Judicial Cooperation (Brussels, 5 December 2005)

Sabine Zwaenepoel, Directorate-General Justice, Freedom and Security, European Commission (Brussels, 29 November 2005)

Consultations

Laetitia Bot, General Secretariat of the Council of the European Union (Personal email correspondence 30 March 2006 and 16 June 2006)

General Secretariat of the Council of the European Union (Personal email correspondence 22 May 2006).

Hans Nilsson, Head of Unit, General Secretariat of the Council of the European Union (Personal email correspondence 31 August 2007).

Appendix 1

Council of Europe
Resolution (97) 24
On The Twenty Guiding Principles for the Fight Against Corruption
(adopted on 6 November 1997)

1. to take effective measures for the prevention of corruption and, in this connection, to raise public awareness and promoting ethical behaviour;
2. to ensure co-ordinated criminalisation of national and international corruption;
3. to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations;
4. to provide appropriate measures for the seizure and deprivation of the proceeds of corruption offences;
5. to provide appropriate measures to prevent legal persons being used to shield corruption offences;
6. to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society;
7. to promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks;
8. to ensure that the fiscal legislation and the authorities in charge of implementing it contribute to combating corruption in an effective and co-ordinated manner, in particular by denying tax deductibility, under the law or in practice, for bribes or other expenses linked to corruption offences;
9. to ensure that the organisation, functioning and decision-making processes of public administrations take into account the need to combat corruption, in particular by ensuring as much transparency as is consistent with the need to achieve effectiveness;

- 10.** to ensure that the rules relating to the rights and duties of public officials take into account the requirements of the fight against corruption and provide for appropriate and effective disciplinary measures; promote further specification of the behaviour expected from public officials by appropriate means, such as codes of conduct;
- 11.** to ensure that appropriate auditing procedures apply to the activities of public administration and the public sector;
- 12.** to endorse the role that audit procedures can play in preventing and detecting corruption outside public administrations;
- 13.** to ensure that the system of public liability or accountability takes account of the consequences of corrupt behaviour of public officials;
- 14.** to adopt appropriately transparent procedures for public procurement that promote fair competition and deter corruptors;
- 15.** to encourage the adoption, by elected representatives, of codes of conduct and promote rules for the financing of political parties and election campaigns which deter corruption;
- 16.** to ensure that the media have freedom to receive and impart information on corruption matters, subject only to limitations or restrictions which are necessary in a democratic society;
- 17.** to ensure that civil law takes into account the need to fight corruption and in particular provides for effective remedies for those whose rights and interests are affected by corruption;
- 18.** to encourage research on corruption;
- 19.** to ensure that in every aspect of the fight against corruption, the possible connections with organised crime and money laundering are taken into account;
- 20.** to develop to the widest extent possible international co-operation in all areas of the fight against corruption.

Appendix 2

Ten Principles for Improving the Fight Against Corruption in Acceding, Candidate and Other Third Countries

Commission (EC), 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy Against Corruption' COM(2003) 317 final, 28.5.2003, Annex

1. To ensure credibility, a clear stance against corruption is essential from leaders and decision-makers. Bearing in mind that no universally applicable recipes exist, national anti-corruption strategies or programmes, covering both preventive and repressive measures, should be drawn up and implemented. These strategies should be subject to broad consultation at all levels.
- 2 Current and future EU Members shall fully align with the EU *acquis* and ratify and implement all main international anti-corruption instruments they are party to (UN, Council of Europe and OECD Conventions). Third countries should sign and ratify as well as implement relevant international anti-corruption instruments.
3. Anti-corruption laws are important, but more important is their implementation by competent and visible anti-corruption bodies (i.e. well trained and specialised services such as anti-corruption prosecutors). Targeted investigative techniques, statistics and indicators should be developed. The role of law enforcement bodies should be strengthened concerning not only corruption but also fraud, tax offences and money laundering.
4. Access to public office must be open to every citizen. Recruitment and promotion should be regulated by objective and merit-based criteria. Salaries and social rights must be adequate. Civil servants should be required to disclose their assets. Sensitive posts should be subject to rotation.
5. Integrity, accountability and transparency in public administration (judiciary, police, customs, tax administration, health sector, public procurement) should be raised through employing quality management tools and auditing and monitoring standards, such as the Common Assessment Framework of EU Heads of Public Administrations and the Strasbourg Resolution. Increased transparency is important in view of developing confidence between the citizens and public administration.
6. Codes of conduct in the public sector should be established and monitored.

- 7.** Clear rules should be established in both the public and private sector on whistle blowing (given that corruption is an offence without direct victims who could witness and report it) and reporting.
- 8.** Public intolerance of corruption should be increased, through awareness raising campaigns in the media and training. The central message must be that corruption is not a tolerable phenomenon, but a criminal offence. Civil society has an important role to play in preventing and fighting the problem.
- 9.** Clear and transparent rules on party financing, and external financial control of political parties, should be introduced to avoid covert links between politicians and (illicit) business interests. Political parties evidently have strong influence on decision-makers, but are often immune to anti-bribery laws.
- 10.** Incentives should be developed for the private sector to refrain from corrupt practices such as codes of conduct or "white lists" for integer companies.

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